CLEMENT F. HAYNSWORTH, JR.

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FIRST CONGRESS

FIRST SESSION

ON

NOMINATION OF CLEMENT F. HAYNSWORTH, JR., OF SOUTH CAROLINA, TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 16, 17, 18, 19, 23, 24, 25, AND 26, 1969

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
34-561 O WASHINGTON : 1969

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[1] On Sept. 17, 1969, by resolution of the Senate (S. Res. 256), Hon. Robert P. Griffin was assigned to serve on this committee.

CONTENTS

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

TUESDAY, SEPTEMBER 16, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:35 a.m., in room 2228, New Senate Office Biulding, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Hart, Kennedy, Bayh, Tydings, Byrd of West Virginia, Hruska, Fong, Thurmond, Cook, and Mathias.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. The committee will come to order.

The Committee on the Judiciary meets today to consider a matter of vital importance to our country—and we meet without the advice and counsel of one of our country's greatest and strongest sons.

Our dear friend and colleague, Everett Dirksen, is lost to us, as is his wisdom and his talent. There is an empty place in our hearts created by the passing of a gifted leader.

His contributions to this committee were as large as he was and yet this outstanding legislator retained, always, the healing human touch. In the heat of conflict and strife, he found the soothing or humorous word. After the battle, regardless of which contenders prevailed, it was he who bound up the wounds and pointed to the new day beyond the passing struggle.

Each of us around this table, along with all Americans, are beneficiaries of his experience, knowledge, understanding, and wit.

We extend our deepest sympathy to his wonderful wife and helpmate, Louella, to his daughter, Joy, and to her husband, the distinguished Senator from Tennessee.

Everett Dirksen left a lasting imprint on our country, her citizens, this committee, and his colleagues.

His spirit will sustain us as we strive on to attain for America those great goals which he sought, with all his strength, to the end of his full and useful life.

Senator HRUSKA. Mr. Chairman, on behalf of the Republican members of this committee, may I extend our appreciation for the very generous and sincere remarks of the chairman with reference to the loss this committee has suffered. Even though he belonged to the entire Senate, the fact remains the leading and senior member of this committee on our side of the aisle is not with us anymore. Again, I

express the appreciation of those on this side of the aisle for the very fine remarks which he has made.

Senator McCLELLAN. Mr. Chairman, I would like to associate myself with the remarks of the chairman and also the distinguished senior member now on the committee on the minority side. We feel a very deep loss in Senator Dirksen's death and we shall certainly miss him on this committee because he was a source of counsel, of wisdom, of strength and one in whom we had great confidence and whose association of which was a delightful and enriching experience.

The CHAIRMAN. The hearing today is to consider the nomination of Judge Clement F. Haynsworth, Jr., of South Carolina, to be Associate Justice of the Supreme Court of the United States.

Notice of a hearing on September 9 was published in the Congressional Record and was subsequently postponed because of the death of Senator Dirksen to this date.

The American Bar Association's Standing Committee on the Federal Judiciary states that the members of the committee are unanimously of the opinion that Judge Haynsworth is highly acceptable from the viewpoint of professional qualifications for this appointment.

At this time, I will enter into the record copies of the following documents:

Memorandum of Senators Eastland and Hruska relating to the Department of Justice file on Judge Haynsworth;

Copy of Justice Department file on Judge Haynsworth;

Copy of correspondence between Senator Hruska and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel;

Copy of letter dated September 5, 1969 from Senators Hart and Tydings to me;

Copy of letter from Judge Haynsworth dated September 6, 1969 in answer to questions raised by Senators Hart and Tydings;

Copy of supplemental letter from Judge Haynsworth dated September 15, 1969, with attached letter to Judge Haynsworth from the Auto Retailers of America, Inc.

(The documents referred to follow:)

MEMORANDUM OF SENATORS EASTLAND AND HRUSKA RELATING TO THE DEPARTMENT OF JUSTICE FILE ON JUDGE CLEMENT F. HAYNSWORTH, JR.

Certain questions have been raised as to the propriety of the participation by Judge Clement F. Haynsworth, Jr. of the U.S. Court of Appeals for the Fourth Circuit, in the decision of the case of *Darlington Manufacturing Company vs. National Labor Relations Board*, 325 F. 2d 682.

We have made a thorough review of all of the charges, allegations, and insinuations pertaining to these questions, and, in our considered judgment, a study of the facts clearly shows that these charges, allegations, and insinuatious are utterly baseless.

In our judgment, it is clear that Judge Haynsworth owned no stock in any of the companies or corporations that were litigants in that case, that he had no financial interest or stake in the outcome of the litigation, and that he could not have been actuated or motivated by any hope of pecuniary gain in deciding the case.

With the permission of the Department of Justice we are today releasing copies of the entire file of the Department's investigation of this matter, and we are also releasing as a separate package copies of the eight most pertinent letters in that file.

A reading of these documents reveals the following facts:

That the Judges of the Fourth Circuit Court of Appeals carefully and painstakingly investigated all aspects of the conduct of Judge Haynsworth in participating in the decision of the *Darlington* case, including all surrounding circumstances, and completely exonerated him of any improper or unethical conduct;

That these findings of the Judges, along with the files, were submitted to the Attorney General of the United States, Honorable Robert F. Kennedy, who unqualifiedly approved the findings;

And that after the true facts had been established, the person who originally made the charges against Judge Haynsworth to Judge Simon E. Sobeloff, then Chief Judge of the Court of Appeals, Miss Patricia Eames, Assistant General Counsel of the Textile Workers Union of America, acknowledged that the charges made against Judge Haynsworth were unfounded.

It has been suggested by some persons that the thorough investigation conducted by the Judges of the Fourth Circuit Court of Appeals, led by Judge Sobeloff, and of the Justice Department only considered charges of bribery against Judge Haynsworth, and did not consider his conduct in the light of the issues of judicial ethics and conflict-of-interest. Thus, such persons contend that the question of *propriety* of Judge Haynsworth's conduct has never been resolved.

A study of these documents compels the conclusion that there is no basis for this contention. Rather, there is an abundance of evidence to show that the Judges and the Justice Department considered *all* aspects of Judge Haynsworth's conduct, including the questions of judicial ethics and conflict-of-interest, and that Judge Haynsworth was absolved of any misconduct.

The text of the letter of December 17, 1963, from Miss Eames to Chief Judge Sobeloff, which first made the charges and which initiated the investigation by the Judges of the Fourth Circuit Court of Appeals shows that questions were raised not only as to possible bribery, but also as to propriety and ethical conduct. We quote from portions of Miss Eames' letter found on page 3 thereof:

> "Depending on a number of facts which we do not know but which could be discovered by an investigation with subpoena powers, there may or may not be violations of 18 U.S.C. sections 201 and 202. It would appear, however, that only one fact which is now unknown—namely whether or not the Deering Milliken contract was thrown to Carolina Vend-A-Matic needs to be known in order to conclude that Judge Haynsworth should have disqualified himself from participating in this decision.
>
> * * * Whether or not a criminal violation has occurred, we certainly believe that if the Deering Milliken contract was thrown to Carolina Vend-A-Matic, Judge Haynsworth should be disqualified from participating in the decision in this case, and that the resulting two-to-two decision should lead to the sustaining of the NLRB decision below."

After referring to the bribery statutes, 18 U.S.C. sections 201 and 202, Miss Eames stated that whether or not a violation of the bribery statutes had occurred that Judge Haynsworth should have disqualified himself and that his vote should not have been counted in the decision of the case. Obviously, this raised the questions of ethical conduct and conflict-of-interest.

It is just as obvious that Judge Sobeloff and the other Judges of the Fourth Circuit in their thorough investigation did not restrict themselves to implications or insinuations as to alleged bribery, but rather, thoroughly examined the ethical aspects of the conduct of Judge Haynsworth. The concluding paragraph of Judge Sobeloff's letter of February 18, 1964, to Miss Eames illuminates this point:

> "It thus appears that the information received, anonymously, by you was completely unfounded, and it is gratifying that after mature consideration you are convinced of this. However unwarranted the allegation, *since the propriety of the conduct of a member of this court has been questioned,* I am today, at Judge Haynsworth's request and with the concurrence of the entire court, sending the file to the Department of Justice, together with an expression of our full confidence in Judge Haynsworth." (emphasis added)

Judge Sobeloff made the following statement in his letter of February 18, 1964, to Attorney General Kennedy:

"Enclosed is the file of correspondence passing between our court and counsel for the Textile Workers Union of America and Deering Milliken Corporation following the argument of an appeal in our court. Inasmuch as this relates to alleged conduct of one of our colleagues, we think it appropriate to pass the file on to the Department of Justice."

The "alleged conduct" to which Judge Sobeloff referred clearly relates to "the propriety of the conduct of a member of this court" mentioned by him in his letter of the same date to Miss Eames.

Judge Sobeloff concluded his letter to Attorney General Kennedy as follows:

". . . I wish to add on behalf of the members of the court that our independent investigation has convinced us that there is no warrant whatever for these assertions and insinuations, and we express our complete confidence in Judge Haynsworth."

After a review of the file by the Justice Department, Attorney General Kennedy replied to Judge Sobeloff on February 28, 1964, as follows:

"This will acknowledge receipt of your letter dated February 18, 1964, enclosing the file that reflects your investigation of certain assertions and insinuations about Judge Clement F. Haynsworth, Jr.

Your thorough and complete investigation reflects that the charges were without foundation. I share your expression of complete confidence in Judge Haynsworth.

Thanks for bringing this matter to my attention."

Such a ringing endorsement of the conduct of Judge Haynsworth, such broad and spacious language, cannot be reasonably taken to be restricted to charges of alleged bribery, but certainly must include all facets of Judge Haynsworth's official conduct, including the questions of ethics and propriety.

If the Justice Department review of the file had indicated that Judge Haynsworth was innocent of any violations of the criminal law, but that his ethical conduct was questionable, then surely Attorney General Kennedy would have spoken in more guarded language and would have hedged his "expression of complete confidence in Judge Haynsworth."

Senator Hruska has recently requested the Department of Justice to reexamine the conduct of Judge Haynsworth in this matter as it relates to the standards of judicial ethics.

Honorable William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, has submitted a thorough and well-reasoned reply to the inquiry of Senator Hruska. This Opinion of the Justice Department closely examines all of the pertinent facts and circumstances relating to the conduct of Judge Haynsworth taking part in the *Darlington* decision, and comes to the conclusion that his conduct in that case compared with the laws of the United States, the Canons of Judicial Ethics, and the Canons of Judicial Ethics of the American Bar Association.

The Opinion concludes that Judge Haynsworth should not have rescued himself or been disqualified from participating in the decision of the *Darlington* case, and that in light of the facts he was under a duty to take part in that decision.

The Opinion further states that the opinions of the American Bar Association Committee on Professional Ethics and the decisions of state and federal courts confirm the conclusion that Judge Haynsworth acted properly, and that this conclusion is supported by common sense ethical considerations.

Two members of the Senate Judiciary Committee have requested additional information pertaining to certain additional facts and circumstances relating to Judge Haynsworth's participation in the *Darlington* decision. It is our understanding that this additional requested information is in the process of being furnished.

We firmly believe that a review of the presently known undisputed facts pertaining to this matter will lead to the inescapable conclusion that it affords no basis for opposing the nomination of Judge Haynsworth to be an Associate Justice of the Supreme Court of the United States.

OFFICE OF THE GENERAL COUNSEL
TEXTILE WORKERS UNION OF AMERICA
99 University Place
New York 3, N. Y.

Rec'd 12/23/63 Sol's Office

UNION MADE TEXTILE WORKERS UNION OF AMERICA

DEC 19 [illegible] 5

CERTIFIED
RETURN RECEIPT REQUESTED
12Y536

PERSONAL

The Honorable Simon E. Sobeloff, Chief Judge,
United States Court of Appeals for the Fourth Circuit
Post Office Building
Richmond 19, Virginia

JUSTICE DEPARTMENT FILE

TEXTILE WORKERS UNION OF AMERICA,
New York, N.Y., December 17, 1963.

HON. SIMON E. SOBELOFF,
Chief Judge, Court of Appeals for the Fourth Circuit,
Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: I have taken the liberty of marking this letter as "personal" because I believe that you should be the first person to see it. It is written to you in your capacity as Chief Judge of the Court of Appeals.

The consolidated Deering Milliken cases were decided by the Fourth Circuit on Friday, November 15, 1963. On the morning of Wednesday, November 20th, our Union received a telephone call in which the caller, who said that he would not identify himself, stated substantially the following:

I believe that you should know that Judge Haynsworth, who voted against your Union in the Deering Milliken case is the First Vice President of Carolina Vend-A-Matic Company, and that two days after the decision in the Deering Milliken case, Deering Milliken cancelled its contracts with the company or companies which previously supplied vending machines to all of the numerous Deering Milliken mills in the Carolinas, and proceeded to sign a new contract with the Carolina Vend-A-Matic Company pursuant to which that Company would supply vending machines to all Deering Milliken mills.

We immediately proceeded to do what we could to check the accuracy of this allegation. The first element checked out readily; there is no doubt that Judge Haynsworth is or was until very recently the First Vice President of Carolina Vend-A-Matic Company. (We do not know the extent, if any, of his shareholding in the corporation, but we are informed that he has been the First Vice President since the company was founded, and that the Judge's former partner in the law firm of Haynsworth, Perry Bryant, Marion and Johnston, in Greenville, Mr. W. Francis Marion, is and has been the President of Carolina Vend-A-Matic Company.) As to the second element of the allegation—that regarding the throwing of the Deering Milliken vending machine contracts to Carolina Vend-A-Matic—we were first informed that a notice was posted in the Drayton Mill of the Deering Milliken chain at some time prior to December 11th of this year stating that as of January 1st, a complete new set of vending machines would be installed in the mill; we were later informed that the most recent story was that as of January 1, Deering Milliken would *take bids from* vending machine companies.

We have seen two credit reports on Carolina Vend-A-Matic Company. (These reports are not our property.) The first of these reports was dated October 18, 1963. The report stated that it was based upon an interview on October 8, 1963 with the general manager of Carolina Vend-A-Matic, Mr. Wade Dennis. (The interview could not have been held any earlier than October 1, 1963, since it includes the statement that volume for *the first nine months* of 1963 had increased about 25% over that for the corresponding period of 1962.) This report stated that the First Vice President of the corporation was Clement F. Haynsworth, Jr. It further stated that annual estimated sales were $2,000,000. It happened that there was a typographical discrepancy in the report: On the first page the report stated that the company had been founded in 1960; on the second page the founding date was stated as 1950.

A second report had been sought to reconcile this typographical discrepancy. The discrepancy was corrected (the proper date was 1950) in a report sent out on December 3rd entitled "Substitute Report of Even Date [presumably October 18]: Correcting Errors in Composition." This report, still stating that it was based upon the October 8th interview, claimed that "C. F. Haynsworth, Jr., formerly shown as First Vice President resigned about September 1, 1963 and no one has been elected to that office." (The corrected report further states that annual sales were estimated at $3,000,000, an increase of a million dollars—which could represent the Deering Milliken contract.) This is apparently an attempt *retroactively* to create a September, 1963 resignation from corporate office for Judge Haynsworth, since the first report of the October 8th interview (which had to have been written later than September 30th) stated that Judge Haynsworth *was* the First Vice President.

I am sure you can imagine that our Union is gravely disturbed. After having lost a case of the most serious importance by one vote, we have been informed that the party which won the case awarded a significant contract to a firm in which one of the judges was interested. The allegations have checked out:

(1) In fact, the Judge was (at least until recently) an officer of the corporation, and there has been an effort to hide that fact, and (2) in fact, a notice was posted in the mill at Drayton that the vending machines were to be changed.

Thus far, the allegations are clear and definite—the kind of thing that clearly means something if it is true. Because we see these allegations checking out as apparently true, then we begin to wonder about the import of facts whose significance is less clear. For example, we are informed that Judge Haynsworth is extremely close to former Senator Charles Daniels, who in turn is extremely close to Roger Milliken. If this fact stood alone, we would endeavor not to be perturbed by it, but it does not. Knowing these facts, we cannot help but suspect that the reason why Deering Milliken moved for a hearing en banc was to be sure to have Judge Haynsworth on the panel. We cannot help but wonder whether the sentence in the decision regarding print cloth, which was evidently not a part of Judge Bryan's original text (since it was added in handwriting to the typed manuscript) and which the Court has subsequently, on its own motion, omitted from the decision, was not introduced at Judge Haynsworth's suggestion and then withdrawn at his suggestion because Deering Milliken had pointed out to him that by going this far, he had caused the opinion flatly to contradict the record in the case.

We of course have no subpoena power. We cannot examine the officers and look into the books of the vending machine corporation or corporations which previously had the Deering Milliken contract (the chief among which corporations we believe to be the Spartamatic Corporation of Spartanburg, South Carolina), the records of which should presumably reflect any contract cancellation which may have occurred and the date of such a cancellation. Depending on a number of facts which we do not know but which could be discovered by an investigation with subpoena powers, there may or may not be violations of 18 U.S.C. sections 201 and 202. It would appear, however, that only one fact which is now unknown—namely whether or not the Deering Milliken contract was thrown to Carolina Vend-A-Matic—needs to be known in order to conclude that Judge Haynsworth should have disqualified himself from participating in this decision.

We had intended to wait until January 1st to see whether Carolina Vend-A-Matic machines were installed on that date as the notice at Drayton suggested. But the making of the changes in the financial report and the story regarding a taking of bids suggests that Carolina Vend-A-Matic may already fear discovery and consequently have begun an effort to cover its tracks.

We believe that an investigation should be made immediately. We do not know whether we ourselves should ask the Justice Department to investigate or whether we should leave the handling of this matter entirely up to you. It is clear to us that you are the first person to whom the matter should be referred. Whether or not a criminal violation has occurred, we certainly believe that if the Deering Milliken contract was thrown to Carolina Vend-A-Matic, Judge Haynsworth should be disqualified from participating in the decision in this case, and that the resulting two-to-two decision should lead to the sustaining of the NLRB decision below.

If you have any questions to ask of our Union, either I or anyone else in this organization to whom you may wish to speak will make himself immediately available to you.

Very truly yours,

PATRICIA EAMES,
Attorney for Textile Workers Union of America, AFL–CIO.

RICHMOND, VA., *January 7, 1964.*

THORNTON W. BROOKS, Esq.
McLandon, Grim, Holderness & Brooks,
Greensboro, N.C.
STUART N UPDIKE, Esq.,
Townley, Updike, Carter & Rodgers,
New York, N.Y.

GENTLEMEN: Enclosed to each of you is a copy of a letter I have this day written to Miss Patricia Eames, counsel for Textile Workers Union of America, together with a copy of a letter addressed to me by her on December 17, 1963.

The court will be glad to receive any comment from you or your clients. It is suggested that a copy of any communication to the court should be sent to opposing counsel.

Sincerely,

SIMON E. SOBELOFF.

RICHMOND, VA., *January 7, 1964.*

Miss PATRICIA EAMES,
Textile Workers Union of America,
New York, N.Y.

DEAR MISS EAMES: Your letter of December 17, 1963, addressed to me at Richmond, was forwarded to my Baltimore office but my answer was delayed because I was out of the city, recuperating from a recent illness. When our term opened yesterday your letter was placed before the court. An inquiry will be made into the subject matter about which you wrote me, and I will communicate with you further.

Sincerely,

SIMON E. SOBELOFF.

TOWNLEY, UPDIKE, CARTER & RODGERS,
New York, N.Y., December 10, 1964.[1]

Re Darlington Mfg. Co. et al. *v.* NLRB.

Hon. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Fourth Circuit,
Post Office Building,
Richmond, Va.

DEAR JUDGE SOBELOFF: We acknowledge your letter of January 7, 1964, together with the enclosures mentioned. It would have been sooner acknowledged but for my absence, because of illness, on the day of its arrival.

Our preliminary inquires indicate that, so far as the facts are within the knowledge of ourselves and of our client, Deering Milliken, Inc., the innuendoes and charges by TWUA counsel against our client and Judge Haynsworth with regard to vending machines in the Drayton Mill are utterly without foundation in fact.

We have already begun a thorough investigation of the facts to enable us promptly to accept the Court's invitation to submit comments. We shall of course comply with the Court's direction that copies of all communications be supplied to opposing counsel. In doing so, however, we would assume that all correspondence between the Court and counsel on this subject is to be considered sealed and not available for public inspection or distribution, pending further directions from the Court.

Respectfully,

STUART N. UPDIKE.

MCLENDON, BRIM, HOLDERNESS & BROOKS,
Attorneys and Counsellors at Law,
Greensboro, N.C., January 13, 1964.

Hon. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Post Office Building
Richmond, Va.

DEAR JUDGE SOBELOFF: Your letter of January 7, with enclosures, was received by my office during my absence. The serious allegations and inferences contained in the letter of Miss Eames compel me to promptly reply to the extent possible at this time. The Court has solicited the comment of counsel or their clients, and I am replying on behalf of my client, Darlington Manufacturing Company, although it is no longer in existence. I understand that counsel for Deering Milliken, Inc., will communicate with the Court in due course as to Carolina Vend-A-Matic Company, about which I have no knowledge whatsoever.

My comments on the other points are as follows:

1. *En banc court.* Miss Eames states at page 2, paragraph 5, "we cannot help but suspect that the reason why Deering Milliken moved for a hearing en banc was to be sure to have Judge Haynesworth [sic] on the panel." Miss Eames' suspicion is totally unwarranted insofar as my client or myself are concerned.

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[1] Correctly January 10, 1964.

The reason why Darlington petitioned for an en banc hearing is set forth in its petition of 30 May. In brief, the reason there stated was:

"This Court wisely utilized the power to initiate an en banc hearing sua sponte in Docket No. 8908, *Simkins, et al. v. Moses H. Cone Memorial Hospital, et al.*, argued on 1 April 1963. Counsel for the parties in that case, including counsel for the Petitioner herein, were unanimous in the view that it was helpful to utilize the power of the Court to have an en banc hearing. This Court has wisely heeded the admonition of the Supreme Court that the enbanc power convened by § 46(c) is too useful for a court ever 'to ignore the possibilities of its use in cases where its use might be appropriate.' In less tban one year's time, this Court has heard the following cases en banc:" (Nine cases listed.)

I sincerely considered at the time that if it was wise for the Court to initiate an en banc hearing sua sponte in the *Simkins* case, certainly the importance of the present case warranted the invocation of an en banc court, particularly considering the fact that the National Labor Relations Board had decided the case by a three to two decision. Furthermore, my petition for an en banc court noted that as four of the five judges of this Court were already familiar with some aspects of the case, it was particularly appropriate that "all members of the Court pool their wisdom in the hearing and the ultimate determination of these complex proceedings." Interestingly enough, the opinion of the majority was written by Judge Bryan who was the only member of the Court who had not previously participated in some of the proceedings related to the case.

Subsequently, both the National Labor Relations Board and the Union, through their counsel, responded to the petition by notifying the Court that they had no objection to the motion for a hearing and determination of the proceedings en banc.

2. *Deletion of sentence in order.* Miss Eames states at page 2, paragraph 5, that "We cannot help hut wonder whether the sentence in the decision regarding print cloth . . . was not introduced at Judge Haynesworth's suggestion and then withdrawn at his suggestion because Deering Milliken had pointed out to him that by going this far, he had caused the opinion flatly to contradict the record in the case." I do not know who introduced the sentence iu question into the decision, but I do know who suggested that it he modified or withdrawn. The Clerk mailed to counsel for the parties a photocopy of the decision when it was entered and filed. I am enclosing the photocopy of page 9 of the decision as sent to me and this shows that my copy did not contain the sentence in question. On 20 November Mr. Schoemer called me over long distance telephone from his law office in New York, after he had received his photocopy of the opinion, and in the course of our conversation I learned for the first time that my copy did uot contain the inserted sentence. Thereafter I telephoned the Clerk to ascertain if the sentence had been inadvertently omitted from my copy, and as to the exact language in the official copy. The Clerk then examined the record and advised that the sentence should have beeh written into my copy as well. I then advised the Clerk that in my opinion the statement was not entirely correct and I requested him to call my views to Judge Bryan's attention so that changes, if any, that might be made by the Court in the opinion could be handled before the opinion was sent to the printer; I also asked the Clerk to advise me if it was necessary for me to officially call the matter to the Court's attention hy means of a formal document. I did not hear further from the Clerk, nor from any member of the Court, until I received the order of December 9, 1963, wherein the sentence was ordered deleted. The suggestion to Judge Bryan that the added sentence in his written opinion was not entirely supported by the record originated solely with me, and was transmitted by me to Judge Bryan through the Clerk, as indicated.

With respect and esteem, I remain

Sincerely yours,

THORNTON H. BROOKS.

RICHMOND, VA., *January 13, 1964.*

Re Darlington Mfg. Co. et al. *v.* NLRB

STUART N. UPDIKE, Esq.,
TOWNLEY, UPDIKE, CARTER & RODGERS,
New York 17, N.Y.

DEAR MR. UPDIKE: Thank you for your letter of Jauuary 10. The court will await your further communication.

Your suggestion that all correspondence between the court and counsel on this subject should not be available for public inspection or distribution, pending further direction from the court, is, of course, correct.

Sincerely,

SIMON E. SOBELOFF.

TOWNLEY, UPDIKE, CARTER & RODGERS,
New York, N.Y., January 13, 1964.

Re Darlington Mfg. Co. et al. *v.* NLRB

HON. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Fourth Circuit, Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: I regret that I must call to the Court's attention that the date "December 10, 1964" on my letter sent to you last Friday should read "January 10, 1964". Please accept my apologies for the error.

Respectfully,

STUART N. UPDIKE.

TOWNLEY, UPDIKE, CARTER & RODGERS,
New York, N.Y., January 17, 1964.

HON. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Fourth Circuit, Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: This will supplement our letter of January 10, 1964, acknowledged by your letter of January 13, 1964, for which we thank you.

On January 12, a member of our staff was dispatched to Spartanburg, South Carolina, to make a full investigation of the relevant facts concerning vending machine operations in Deering Milliken mills. (We are using that term in this letter generally to identify the mills which sell their products through Deering Milliken, Inc.) The investigation was made by John P. Reiner, Esq., who joined the staff of this firm on January 2, 1964 after service as law secretary to Chief Judge Sylvester J. Ryan, followed by service as an Assistant United States Attorney, both of the Southern District of New York. He has submitted to us a written report, backed up by copies of the relevant documents. This letter is based thereon.

The investigation was conducted primarily through two sources: (1) Deering Milliken Service Corporation, the purchasing department of which, where requested by a plant manager, advised in obtaining proposals from in-plant feeding contractors at the Deering Milliken mills; and (2) Pacolet Industries, Inc., of which the Drayton Mill is a division. Deering Milliken, Inc., as such, was not involved in the investigation.

By way of preface, we observe that the letter to you from union counsel of December 17, 1963, makes two broad charges with respect to vending machine operations at these mills:

> (1) On November 17, 1963, two days after the Court's decision in the Darlington case, "Deering Milliken" cancelled its contracts with the suppliers of vending machines "to all of the numerous Deering Milliken mills in the Carolinas" and transferred or "threw" the business to Carolina Vend-A-Matic Co., Inc. (page 1 of Miss Eames' letter).
>
> (2) While the union has been unable to verify the correctness of the foregoing hearsay report supposedly given by an anonymous telephone caller, it has established that Drayton Mill has transferred, or as of January 1 would transfer, its vending machine contract to Carolina Vend-A-Matic Co., Inc. (hereafter "Carolina Vend-A-Matic") (page 2 of Miss Eames' letter).

Both these statements are absolutely and unqualifiedly false, as we shall now demonstrate, first dealing with the specific instance of Drayton Mill and then with the other Deering Milliken mills.

As to Drayton Mill: For a number of years, food and beverages at Drayton Mill were supplied in part by an outside independent contractor and in part by the services of mill personnel. Early in 1963, the mill manager questioned whether these operations might not be more efficiently carried out by a single outside independent vending contractor. After investigation of the subject and in late

October 1963, the manager decided to transfer these operations to such an outside firm, and enlisted the aid of the purchasing department of Deering Milliken Service Corporation in obtaining proposals. At about this time, a notice was posted on the mill's bulletin board indicating that in the future but at an unspecified date, vending machine operations would be placed in the hands of an independent contractor.

With the assistance of the purchasing department, five vending companies thought to be interested in supplying food and equipment to the Drayton Mill were invited [1] to submit proposals to Mr. Rogers, the plant manager. Included in the list of invitees were Carolina Vend-A-Matic and Automatic Food Service, Inc. of Spartanburg, the company which had been supplying beverage vending machines at Drayton Mill for some years. Proposals were received; most, if not all, of the invitees inspected the facilities available at the plant and the plant manager personally visited the facilities of each of the invitees in order to satisfy himself as to which was likely to supply the best quality food.

On or about December 10, 1963, the plant manager made his determination. To aid in the formulation of his judgment, he prepared a chart on which he tabulated what he regarded as the principal criteria by which each of these invitees was to be judged, and then awarded points to indicate his own evaluation of the invitees' qualifications. By this method, Automatic Food Service, Inc. of Spartanburg, the existing contractor at the mill, emerged with the highest rating; Carolina Vend-A-Matic was second, with a rating about 25% below the first company. Accordingly, Automatic Food Service, Inc. was notified that the contract would be awarded to it, and the four other bidders (including, of course, Carolina Vend-A-Matic) on December 16, 1963 were notified that they had lost out. The contract was signed on December 19, 1963.

Examples of the documentary evidence available in support of the foregoing are: proposals to Drayton Mill from each of the vending companies; the chart prepared by Drayton's manager during the process of arriving at his decision; and the correspondence with the various bidding concerns.

As to Other Deering Milliken Mills: During the latter part of 1963, there were approximately 40 textile mills (including related companies) which sold their production through Deering Milliken. These include the mills acquired by Deering Milliken, Inc. from Textron, Inc. in the Spring of 1963. Of these, 27 were served by 10 different independent vending machine companies, of which Carolina Vend-A-Matic was one, serving 5 different plants. (Another vending machine company served 6 plants; the rest served less than 5.) It appears that of Carolina Vend-A-Matic's 5 contracts, 4 had been in existence since 1958. The remaining one was awarded in July 1963, on the basis of an invitation for proposals, followed by an award of the contract, as has been described above in the case of Drayton Mill. In this instance, however, the mill management decided on Carolina Vend-A-Matic (out of eight competitive proposals) as the preferable bidder. The contract was awarded accordingly. The plant in question has only about 250 employees.

Needless to say, there is not the slightest evidence that any Deering Milliken mill has ever cancelled a vending machine contract with the intention of transferring or "throwing" the contract to Carolina Vend-A-Matic, nor has any such mill ever done so. In short, the charge which union counsel says was anonymously relayed by telephone on November 17, 1963, to that effect is utterly without foundation.

We are, of course, in no position to deal with the allegations concerning Judge Haynsworth's ownership in Carolina Vend-A-Matic, or what the union portrays as a clumsy attempt to divest himself of any public connection with that company on the eve of the Darlington decision. It would, we feel, be both presumptuous and unnecessary for us to assay any defense of Judge Haynsworth against the irresponsible charges in the letter from Miss Eames. From the standpoint of Deering Milliken, Inc., however, as a party to the litigation in which the innuendoes have been raised, and a company which is implicitly if not primarily charged with bribing, or attempting to bribe, a member of the Federal Judiciary we can only voice the hope that if and when there should issue from the Court a vindication of Judge Haynsworth and a flat rejection of the union's suggestion that he should be disqualified from the Darlington decision, the Court's determination

[1] Each of the invitees, including Carolina Vend-A-Matic, was then supplying food and beverage vending operations to one or more Deering Milliken mills.

should make clear that Deering Milliken, Inc. is likewise free from any possible guilt in this situation.

In view of the length which this letter has already reached, we shall refrain from commenting on the peripheral charges by Miss Eames that are dealt with in Mr. Brooks' letter to the Court of January 16. Needless to say, we adopt Mr. Brooks' statement of the facts, so far as they are known to us.

We stand ready to meet with the Court, or to supply to the Court any information desired concerning any particulars of the matters under inquiry. We shall be happy to make Mr. Reiner, and his report, available to the Court; or if the Court wishes, either Mr. Schoemer or I will be glad to attend before it for further substantiation of these statements.

Respectfully,

STUART N. UPDIKE.

TOWNLEY, UPDIKE, CARTER & RODGERS,
New York, N.Y., January 27, 1964.

Re Darlington Mfg. Co. et al. *v.* NLRB

Hon. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Fourth Circuit,
Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: I acknowledge with thanks your letter of January 23, 1964. I respond to your inquiry as follows:

The Five Plants Served by Carolina Vend-A-Matic Co., Inc.:

At Marietta, South Carolina on the premises of Gayley Mill are located three separate operations. The first of these is the Gayley Mill itself; the other two are Clemson Industries and Mayco Yarns. Each of these is a separate manufacturing operation, although all three are located in the same plant premises at Gayley Mill. These operations constitute three of the total of five served by Carolina Vend-A-Matic Co., Inc. (hereafter "Carolina Vend-A-Matic"), as stated in my letter of January 17th.

The fourth plant is Jonesville Products, located at Jonesville, South Carolina. The fifth is Magnolia Finishing Plant, located at Blacksburg, South Carolina.

The Dates on Which Such Service Began

While the initial installation of two coffee machines by Carolina Vend-A-Matic at Gayley began in 1952, the more substantial operation as presently constituted began in March 1958. The servicing at Jonesville began in October 1958. The servicing at Magnolia began in August, 1963.

The number of Machines and Approximate Volume

At Gayley there are six vending machines, as follows:

1 Coffee machine
1 Cold Drink machine
1 Candy machine
1 Cigarette machine
1 Hot Soup machine
1 Sandwich machine.

The employees of Gayley Mill, Clemson Industries and Mayco Yarns are all served by the same machines. They total approximately 380 people. The average gross weekly sales is approximately $950.

At Jonesville Products there are two vending machines: 1 Coffee machine, 1 Candy machine. The plant employs approximately 50 people. The average gross weekly sales is approximately $24.

At Magnolia Finishing Plant there are *two* banks of machines, each consisting of eight vending machines, as follows:

1 Coffee machine
1 Cold Drink machine
1 Candy machine
1 Cigarette machine
1 Sandwich machine
1 Milk machine
1 Ice Cream machine
1 Pastry machine

There are three other service areas in the plant, each with three vending machines, as follows:

1 Coffee machine
1 Cold Drink machine
1 Candy machine

The Magnolia plant employs approximately 250 people. The average gross weekly sales is approximately $1,000.

For the convenience of the Court, we have prepared and enclose herewith a table setting forth the above information. As stated in concluding our letter of January 17th, we stand ready to meet the further requests of the Court.

Respectfully,

STUART N. UPDIKE.

CHART SHOWING DATES, NUMBER OF MACHINES, AND VOLUME BY PLANT

Plants	Date service began	Approximate volume		
		Number of machines	Number of employees	Average weekly gross sales
Gayley Mill, Marietta, S.C. Clemson Industries, Marietta, S.C. Mayco Yarns, Marietta, S.C.	March 1952 (coffee only); March 1958.	6	380	$950
Jonesville Products, Jonesville, S.C.	October 1958	2	50	24
Magnolia Finishing Plant, Blacksburg, S.C.	August 1963	(1)	250	1,000

[1] 8 times 2 equals 16; 3 times 3 equals 9

TOWNLEY, UPDIKE, CARTER & RODGERS,
New York, N.Y., February 11, 1964.

Re Darlington Mfg. Co. et al *v.* NLRB

Hon. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals, Fourth Circuit,
Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: In Mr. Updike's absence, I acknowledge receipt of a copy of Miss Eames' letter of February 6th to the Court.

As comment by us or our client would seem to be superfluous under the circumstances, we shall await further instructions or advice from the Court.

Respectfully,

JOHN R. SOHOEMER, Jr.

TEXTILE WORKERS UNION OF AMERICA,
February 6, 1964.

Hon. SIMON E. SOBELOFF,
Chief Judge, U.S. Court of Appeals for the Fourth Circuit, Post Office Building, Richmond, Va.

DEAR JUDGE SOBELOFF: Having read and reread Mr. Updike's letter to you of January 17, I believe that the facts therein set forth established that Deering Milliken did not throw its vending machine contracts to Carolina Vend-A-Matic as was alleged to our Union on November 20. With that basic fact established, it becomes clear that my collateral concerns, as expressed to you in the last paragraph on the second page of my letter to you of December 17, became inappropriate.

I regret that Mr. Updike feels that my letter to you was irresponsible. At the time when the telephoned message to our Union had been passed on to me, and I had noted the officerships in Carolina Veuda-A-Matic and bad heard what reports were available to me regarding Deering Milliken's southern plants, frankly I was sorely troubled as to what I *should* do about a half-knowledge which it would clearly be irresponsible to keep silent abont. It appeared to me that the most responsible course was to write to the Chief Judge.

My letter to you has caused trouble. I am genuinely sorry for that. Since we now know that the allegation made to our Union was inaccurate, we know that that trouble was unnecessary. Thus I am the more regretful of the trouble caused.

Sincerely yours,

PATRICIA EAMES, *Assistant General Counsel.*

U.S. COURT OF APPEALS,
FOURTH JUDICIAL CIRCUIT,
February 18, 1964.

MISS PATRICIA EAMES,
Assistant General Counsel,
Textile Workers Union of America,
New York, N.Y.

DEAR MISS EAMES: Thank you for your letter of February 6. Your frank recognition that the statements made to you in the anonymous telephone call were in error, and that your acknowledgement that the concerns expressed by you on the basis of that call were unwarranted, should terminate this matter satisfactorily to all concerned.

For your further information, to complete the record, and in simple justice to Judge Haynsworth, I think I should inform you of some additional facts which our inquiry disclosed.

Information which the court has obtained from officials of Carolina Vend-A-Matic is entirely consistent with that which it has received through attorneys for Deering Milliken, copies of which were sent you. There was one slight discrepancy which calls for an explanatory word. Carolina Vend-A-Matic Co. had reported that it had vending machiues in three identified plants related to Deering Milliken, Gayley Mill being one of them. Though Gayley Mill is one plant under one roof and there is only one vending installation there, Deering Milliken classed it as three operations; but they both meant the same thing.

Your anonymous informer said that Deering Milliken had canceled all of its contracts with other vending machine companies and was throwing all of its many plants as vending machine locations to Carolina Vend-A-Matic. Some apparent corroboration of this might be inferred from the fact that a notice of a new vending operation had been posted at Drayton Mill.

Our inquiry produces no confirmation of the cancellation by Deering Milliken of any vendor's contract. A vending machine company had coffee vending machines in Drayton Mills, but all other food services were supplied by employees of the company operating "dope wagons." As Mr. Updike has reported, officials of Deering Milliken decided to replace the dope wagons with vending machines and sought proposals for complete vending from five companies, including the one which already had the coffee vending machines in the plant. Mr. Dennis and Mr. League, of Carolina Vend-A-Matic, conferred with Mr. Rogers of Drayton Mills on December 4, 1963, and, in response to his request on that date, submitted a proposal to him on December 9. Mr. Dennis, of Carolina Vend-A-Matic, received a letter from Mr. Foster, Personnel Manager of Drayton Mills, dated December 16, informing him that it had been decided to have Automatic Food Service, Inc. provide this service. Automatic Food Service, Inc. is the company which previously had the coffee machines in the plant.

As we also have learned, Carolina Vend-A-Matic was one of a number of vending machine companies which sought the business of the new Magnolia Finishing plant in 1963. On the basis of competitive bidding, Carolina Vend-A-Matic obtained that business. At about the same time, however, in the summer of 1963, it was one of several competitive bidders for the vending business of anther Deering Milliken related plant, which, like Drayton Mills, was moving to complete food vending. It did not get that business. Thus, in 1963, Carolina Vend-A-Matic sought through competitive bidding the business of three Deering Milliken related plants, obtained that of one and lost that of the other two.

The actual facts do not warrant any inference that Deering Milliken related mills have preferred Carolina Vend-A-Matic in any way over other vendors.

The circumstances of Judge Hayusworth's resignation as a director of Carolina Vend-A-Matic are also well known to us, and it was prompted by a resolution of the Judicial Conference of the United States and was in no way related to Deering Milliken contracts.

When Judge Haynsworth came on this court in 1957, he was a member of the board of directors of a number of corporations. He resigned from the board of each of those corporations which was publicly owned. He did this in order to avoid any chance that someone might undertake to influence him indirectly through a corporation of which he was known to be a director. He did not resign from the boards of two corporations. One of those two is a small, passive corporation in which members of his family have an interest. It owns real estate under long term leases and engages in no active business. He also remained on the board of Carolina Vend-A-Matic, which is not publicly owned, for he thought that the considerations which led him to resign from the boards of the other corporations were inapplicable to it and the small, passive corporation.

Some months ago it became known that judges in other sections of the country were serving on the boards of large, active, publicly owned corporations. They had not done what Judge Haynsworth had done in the first instance. Their service on the boards of such corporations led to criticism, with the result that last fall the Judicial Conference of the United States adopted a resolution that—

> "No justice or judge of the United States shall serve in the capacity of an officer, director or employee of a corporation organized for profit."

In obedience to this resolution Judge Haynsworth severed official relations with Carolina Vend-A-Matic and the small, passive corporation. Judge Haynsworth's colleagues knew of these matters at the time and discussed them with him. Clearly his resignation has no sinister implication; it was a prompt, natural and expected response to the resolution adopted by the Judicial Conference.

Incidentally, we are assured that Judge Haynsworth has had no active participation in the affairs of Carolina Vend-A-Matic, has never sought business for it or discussed procurement of locations for it with the officials or employees of any other company.

It thus appears that the information received, anonymously, by you was completely unfounded, and it is gratifying that after mature consideration you are convinced of this. However unwarranted the allegation, since the propriety of the conduct of a member of this court has been questioned, I am today, at Judge Haynsworth's request and with the concurrence of the entire court, sending the file of the Department of Justice, together with an expression of our full confidence in Judge Haynsworth.

Sincerely,

SIMON E. SOBELOFF.

U.S. COURT OF APPEALS,
FOURTH JUDICIAL CIRCUIT,
February 18, 1964.

Hon. ROBERT F. KENNEDY,
Attorney General,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: Enclosed is the file of correspondence passing between our court and counsel for the Textile Workers Union of America and Deering Milliken Corporation following the argument of an appeal in our court. Inasmuch as this relates to alleged conduct of one of our colleagues, we think it appropriate to pass the file on to the Department of Justice.

Happily, Miss Eames, who wrote the initial letter to the court on December 17, 1963, has herself acknowledged that the assertions and insinuations about Judge Haynsworth, made to her by some anonymous person in a telephone call, are without foundation; but I wish to add on behalf of the members of the court that our independent investigation has convinced us that there is no warrant whatever for these assertions and insinuations, aud we express our complete confidence in Judge Haynsworth.

Sincerely,

SIMON E. SOBELOFF.

Form No. DJ-960
(Rev. 4-13-61)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO	NAME	BUILDING AND ROOM
1.	John Doar	
2.	Carl Belcher Chief Criminal Div.	
3.		
4.		✓
5.		

- ☐ SIGNATURE
- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☒ PREPARE REPLY FOR THE SIGNATURE OF RFK

REMARKS

Carl
I intend to prepare an acknowledgment from the A.G. making reference to Stoneleff's interpretation handling of this allegation. any comment?

FROM

NAME	BUILDING, ROOM, EXT.	DATE
John Doar	421 x	2/26/64

Form No. DJ-96a
(Rev. 7-17-63)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO:	NAME	DIVISION	BUILDING	ROOM
1.	John Duffy		4212	
2.				
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4.				

- ☐ SIGNATURE
- ☐ APPROVAL
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- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

John - as I began at the beginning and read this - I thought - "Shades of Bobby Baker" with the vending machine aspects - Anyway read it - as I suppose the matter has been fully and satisfactorily dug into by Judge Sobeloff

FROM: NAME	BUILDING, ROOM, EXT.	DATE
	[illegible]	[illegible]
		2/26

Form No. DJ-96a
(Rev. 4-13-61)

DEPART ENT OF JUSTICE

ROU NG SLIP

TO	
NAME	BUILDING AND ROOM
1. A. G.	
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- ☐ PER CONVERSATION
- ☐ AS REQUESTED
- ☐ NOTE AND FILE
- ☐ YOUR INFORMATION
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

OK to sign

Hoover

FROM		
NAME	BUILDING, ROOM, EXT.	DATE

FEBRUARY 28, 1964.

HON. SIMON E. SOBELOFF,
U.S. Court of Appeals for the Fourth Circuit,
Baltimore, Md.

DEAR MR. CHIEF JUDGE: This will acknowledge receipt of your letter dated February 18, 1964, enclosing the file that reflects your investigation of certain assertions and insinuations about Judge Clement F. Haynsworth, Jr.

Your thorough and complete investigation reflects that the charges were without foundation. I share your expression of complete confidence in Judge Haynsworth.

Thanks for bringing this matter to my attention.

Sincerely,

ROBERT F. KENNEDY, *Attorney General.*

SENATOR HRUSKA-REHNQUIST CORRESPONDENCE

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., September 2, 1969.

HON. JOHN N. MITCHELL,
The Attorney General,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: The Senate Judiciary Committee is scheduled to begin hearings soon on the President's nomination of Judge Clement F. Haynsworth to be an Associate Justice of the Supreme Court of the United States.

Shortly after the President submitted Judge Haynsworth's name to the Senate, statements in public press have charged that Judge Haynsworth should have disqualified himself from a labor case that was decided several years ago by the Court of Appeals for the Fourth Circuit.

Because these same charges indicate that the Justice Department has a file on this matter, and because the Justice Department has been called upon in prior confirmation hearings to assist this Committee in analyses of legal points, I would very much appreciate having the views of the Department as to whether Judge Haynsworth should have disqualified himself in this case.

I would propose to share your reply with the Chairman and my fellow members of the Judiciary Committee.

Yours very truly,

ROMAN L. HRUSKA,
U.S. Senator.

SEPTEMBER 5, 1969.

HON. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: The Attorney General has asked me to reply to your letter to him dated September 2, requesting that the Justice Department comment on certain charges that have been made against Judge Clement F. Haynsworth. These charges, as I understand them, are that since Deering-Milliken, Inc., was a party to the case of *Darlington Mfg. Co.* v. *National Labor Relations Board*, 325 F. 2d 682, decided by the Court of Appeals for the Fourth Circuit in 1963, and since Judge Haynsworth owned stock in a corporation which did business with Deering-Milliken, he had an "interest" in the *Darlington* case and should have disqualified himself from sitting. I understand from your letter that the Department's views will be circulated to the Chairman and other members of the Judiciary Committee, which will shortly consider the President's nomination of Judge Haynsworth to be an Associate Justice of the Supreme Court of the United States.

We have received from Judge Haynsworth a copy of a statement which he has prepared in response to a request from Senator Eastland, the Chairman of the Judiciary Committee, and have used that statement, together with the file forwarded to the Justice Department in 1964 by Chief Judge Sobeloff,[1] as the factual basis for our reply to your question.

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[1] The file compiled by Chief Judge Sobeloff was the result of an investigation by the Court itself into a similar, though not identical, accusation against Judge Haynsworth. I have assumed from your letter that you wished to have the views of the Department without regard to the findings of the Court, and this letter has been prepared accordingly.

The *Darlington* case was orally argued before the Court of Appeals for the Fourth Circuit on June 13, 1963, and was decided by that court on November 15, 1963.[2] Judge Haynsworth had been appointed to the Court of Appeals six years earlier, in 1957. During all of the time that the *Darlington* case was pending before the Court of Appeals in 1963, Judge Haynsworth held one-sevenths of the stock of a South Carolina corporation known as Carolina Vend-A-Matic Company, which he had helped organize in 1950.

During 1963 Vend-A-Matic obtained slightly more than three percent of its gross sales from various plants of the Deering-Milliken combine, plants in which some 700 out of a total of 19,000 Deering-Milliken employees worked. Deering-Milliken granted space to vending machine companies on the basis of competitive bidding. During 1963 Vend-A-Matic competed for three such awards, obtaining one and losing two. None of the Deering-Milliken officials who awarded vending machine rights knew that Judge Haynsworth was associated with Vend-A-Matic. Judge Haynsworth in turn played no part at any time in Vend-A-Matic's site acquisition program, and was largely unfamiliar with information regarding its site locations at the time the *Darlington* case was before his Court.

Prior to 1957 Judge Haynsworth took some part in obtaining financing for Vend-A-Matic; after his appointment to the Court of Appeals, he took no active part in the business at all. Prior to his appointment to the Court of Appeals, he was both a director and a Vice President of Vend-A-Matic; he orally resigned as Vice President in 1957, although the minute book of the corporation continued to show him as holding that office in subsequent years. He continued as a director until October, 1963, when he resigned in compliance with a resolution of the United States Judicial Conference adopted shortly before that date.

I regard the dates of resignation by Judge Haynsworth as an officer and director of Vend-A-Matic as immaterial for purposes of this analysis. Since he remained a holder of stock in the company of substantial value after he has resigned his official positions, he was in spite of these resignations unquestionably "interested" in Vend-A-Matic. Since he was not active in the conduct of its business, and was unfamiliar with the details of the location of its machines, the fact that he was a director does not change the situation from what it would have been had he been simply a stockholder. The legal and ethical question raised by these facts is whether a judge, who owns stock in one corporation, which in turn does business with a second corporation, should disqualify himself when the second corporation is a party litigant in his court.

Those statutes and canons of ethics which regulate judicial conduct are basically of two kinds: those which govern the *extra-judicial* activities of a judge, and those which govern his *judicial* activity.

18 U.S.C. 205 prohibits judges from acting as attorneys or agents for any party in a proceeding to which the United States is a party; 28 U.S.C. 454 prohibits the practice of law by a judge appointed under the authority of the United States; several of the canons of judicial ethics likewise restrict the sort of extra-judicial conduct in which a judge may engage. The recent action of the Judicial Conference of the United States, requiring that permission of the Conference be obtained for judges to engage in extrajudicial employment, and that judges report to the Conference outside income from personal services, was addressed to extra-judicial conduct. The charges made against Judge Haynsworth, on the other hand, are directed to the second kind of judicial conduct which is regulated by statute and by canons of judicial ethics—the conduct of the judge in the discharge of his *judicial* duties.

Both a statute and one of the Canons of Judicial Ethics are revelant in assessing these charges.[3] 28 U.S.C. 455 provides that:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a ma-

[2] Though not strictly relevant to your inquiry, an accurate procedural description of this litigation is attached to this letter with the thought that it may be of interest to you and to other Committee members.

[3] Canon 26, ABA Canons of Judicial Ethics, states: "A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the courts; and, after his accession to the bench, he should not retain such investment previously made, longer than a period sufficient to enable him to dispose of them without serious loss."

terial witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceedings therein."

Canon 29 states: "A judge should abstain from performing or taking part in any judicial act in which his personal interests are are involved. If he has personal litigation in the court of which he is a judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy."

Though this Canon has been mentioned in connection with the charges made against Judge Haynsworth, I do not believe that it is applicable. None of the information about the Vend-A-Matic suggests that it was an enterprise ". . . apt to be involved in litigation in the courts", and it was not in fact involved in the *Darlington* case.

In addition to the federal disqualification statute, numerous states have disqualification statutes cast in somewhat similar terms, and precedents from those jurisdictions are helpful in the absence of authoritative decisions construing the federal statute. Under the statute, the question is quite clearly whether Judge Haynsworth had a "substantial" interest in the *Darlington* case; under Canon 29, the question is whether Judge Haynsworth's "personal interests" were involved in that litigation.

Quite obviously, when we are dealing with a concept which has both a legal and an ethical content, it is not desirable to parse the language in a manner which might sacrifice ethical substance to legal form. At first blush, indeed, it might appear to be an easy solution to the question of disqualification for the judge to "bend over backwards" and recuse himself if there be even the most tenuous claims that he ought to do so. More careful consideration, I believe, suggests that this is not the case, and requires that a quite precise determination be made in each case on the basis of the statute, the canons and the facts. This is because of the generally accepted principle stated as follows by two different federal courts of appeals:

"There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." In re *Union Leader Corp.*, 1st Cir., 292 F. 2d 381, 391 (1961), quoted with approval in *Wolfson* v. *Palmieri*, 2nd Cir., 396 F. 2d 121 (1968).

The delays and procedural snarls which not infrequently result from the disqualification of a trial judge are serious enough to suggest that such action should be resorted to only when justified. Additional complications occur when the judge recusing himself sits on an appellate court, since there is not the freedom to transfer a case from one appellate court to another as there is from one trial judge to another. John P. Frank, in an article entitled, "Disqualification of Judges", 56 Yale Law Journal 605 (1947), points out that from 1941 to 1946 three cases pending before the Supreme Court of the United States had to be either dismissed for lack of a quorum, *Chrysler Corporation* v. *United States*, 314 U.S. 583 (1941), continued for lack of a quorum, *North American Company* v. *Securities & Exchange Commission*, 327 U.S. 686 (1946), or transferred for final decision to a court of appeals pursuant to special statute, *United States* v. *Aluminum Company of America*, 322 U.S. 716 (1944). On more than one occasion since the date of that article, the Supreme Court of the United States has been obliged to affirm the judgment of the lower court by an equally divided vote and without opinion, because of disqualification. *Bailey* v. *Richardson*, 341 U.S. 918 (1951); *Alitalia-Linee Aeree Italiane*, S.p.A. v. *Lisi*, 390 U.S. 455 (1968); *Anderson* v. *Johnson*, 390 U.S. 456 (1968); *World Airways, Inc.* v. *Pan American World Airways, Inc.*, 391 U.S. 1968). One of the leading antitrust cases of the 1950s, *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), was decided by a Court consisting of only six justices, who divided 4 to 2 on the issue before them.

While disqualifications in the courts of appeals do not have the same significance with respect to final decision of important points of law as do disqualifications in the Supreme Court of the United States, they nonetheless create more awkwardness than do disqualifications at the trial court level. Indeed, a serious procedural snarl would have resulted in the *Darlington* case had one of the five judges of the Court of Appeals disqualified himself. Had Judge Haynsworth disqualified himself, the Court would presumably have been evenly divided, Judges Bryan and Boreman voting to set aside the Board's order. Chief Judge Sobeloff and Judge Bell voting to enforce the order. While in the case of a direct appeal

of a judgment of a district court, the result of such a division is affirmance, it is by no means clear that this would be the result in an agency proceedlug where both the agency and the respondent are petitioning the appellate court for relief.

Disqualification where required by statute or by the Canons of Ethics is a judge's undoubted duty. But the disruptive consequences of disqualification, which may be readily borne in order to insure fairness where the judge does have a "substantial interest" in the litigation, should not be borne in order to gratify the desire on the part of either a litigant or of the judge himself that the judge not sit when he does not have such a substantial interest.

There is thus no escape from a careful analysis of each fact situation. The "substantial interest" referred to in the statute and the "personal interest" referred to in the canon is a pecuniary, material interest in the outcome of the litigation. The clearest case is one in which the judge is a party to the lawsuit; obviously he may not sit in such a case. Little different is the case in which the judge owns a significant amonnt of stock in a corporation which is a party to a lawsuit before him; he, too, must recuse himself. Parties to lawsuits either win or lose them, in whole or in part, and it is difficult to conceive of a lawsuit in which a party, or the stockholder of a corporate party, does not have a material, pecuniary interest in the way in which the lawsuit is decided.

These clear cases quite obviously do not decide the question relating to Judge Haynsworth in the *Darlington* case. Venda-A-Matic had some business dealings with Deering-Milliken, hut it was in no sense a party to the Darlington litigation. One question is presented when a judge holds stock in a corporation which is a party to litigation before him. A quite different question is posed when the judge merely owns stock in a corporation which "does business" with a party to litigation before him. A general rule of disqualification in the second situation is neither administratively workahle nor ethically desirable. The judge who owns stock in American Telephone and Telegraph Company must simply seek other employment if such a rule be applied, since that corporation presumably does business with virtually every party to every lawsuit in the nation. On a smaller scale, the same would be true of a judge owning stock in a local public utility. Yet surely no one would seriously contend that a judge, by reason of his stockholding in such corporations, would be influenced in favor of parties who were their customers.

A slightly different case is that of a judge who owns stock in a local bank, which in turn has loans outstanding to various individuals and businesses in the community. Where a solvent debtor of the bank is a party to a lawsuit, the interests of the bank in seeing its debtor prevail in order to increase the probabilities of repayment of its loan is theoretically present, but is remote indeed. On the other hand, a judge owning a significant amount of stock in a bank which in turn has a large unsecured loan outstanding to Company X, a company in financial difficulties, should disqualify himself in a treble damage action brought by Company X against a thoroughly solvent defendant.

It therefore seems clear that no categorical rule may be laid down in the case of a judge owning stock in a corporation which does business with a party litigant in the judge's court. Not only is disqualification in all such cases not required ethically, but the adoption of such a principle would make it impossible in many cases to even assemble the facts necessary to pass on a question of disqualification. A corporation need not be listed in Poor's in order to have a number of customers buying from it, and a number of sellers selling to it. The great majority of each are likely to be unknown to a stockholder who takes no active part in the conduct of the corporation's business.

Instead of a broad rule of disqualification in such cases, the principle hehind the provision for disqualification suggests that the facts of each case must be analyzed in order to see whether the judge can fairly be said to have a "substantial interest" in the litigation. It is clear from the examples cited that the characterization of a corporation as "doing business" with a party litigant is far too imprecise to enable one to determine whether the corporatiou has a "substantial interest" in the litigation. Tbe type and amount of business done, and the effect that various alternative outcomes of the litigation would have on the corporation which is "doing" the "business" must all be considered. A corporation, and therefore those owning substantial stock in the corporation, would seem to have a "substantial interest" in the litigation if it would be probably affected in some defineable, material way by one outcome of tbe litigation as opposed to another.

Applying this test to Judge Haynsworth's position in the *Darlington* case, I am inescapably led to the conclusion that he should not have disqualified himself. Vend-A-Matic was one of many suppliers of food services to the various Deering-Milliken plants, and Deering-Milliken was one of many owners of installations in which Vend-A-Matic food dispensing machines were placed. It is clear from the facts presented that the Deering-Milliken officials who dealt with vending machine suppliers had no idea that Judge Haynsworth had any connection with any of these companies. As a matter of common sense, as well as of law, it is not possible to identify any conceivable effect that a decision one way or another in the *Darlington* case would have had on the fortunes of Vend-A-Matic.

The opinions of the American Bar Association Committee on Professional Ethics and the decisions of state and federal courts confirm our conclusion that Judge Haynsworth acted properly; disqualification has not been regarded as proper in circumstances such as those surrounding the *Darlington* decision.

In attempting to delineate the scope of the "substantial interest" referred to in the statute and the "personal interest" referred to in the Canon, virtually all of the decisions speak in terms of a "direct" or "immediate" interest as opposed to a "remote" or "contingent" interest in the outcome of the litigation. A New York appellate court made this statement in connection with the general problem:

"The interest which will disqualify a judge to sit in a cause need not be large, but it must be real. It must be certain, and not merely possible or contingent; it must be one which is visible, demonstrable, and capable of precise proof." *People* v. *Whitridge*, 129 N.Y. Supp. 300, 304 (App. Div. 1911).

Similarly, The American Bar Association Committee on Professional Ethics decided in Formal Opinion 170 (1937) that a jndge should disqualify himself from a case if he owned stock in a corporation that was a party to the litigation. In response to a questionnaire, virtually all state and federal appellate judges indicated that their practice was in conformity with the opinion of the ABA. Frank, op. cit.

At the other extreme, judges, recognizing their duty to sit, have properly refused to disqualify themselves when their interest was remote and insubstantial. For example, it has been held that disqualification was not required under the federal statute when the judge's stockholdings in oue of the litigants was a minuscule fraction of the issued and outstanding stock. *Lampert* v. *Hollis Music, Inc.*, 105 F. Supp. 3 (E.D.N.Y. 1952).

Attempts to extend disqualification to cases where a judge holds stock, not in a party litigant, but iu a corporation which had some sort of dealings with a party litigant, have been rebuffed by courts except under unusual circumstances where that interest was not remote. Several cases have arisen in which a judge owned stock in a creditor of one of the parties to the litigation before him, and his disqualification was sought, presumably on the theory that the creditor necessarily had a pecuniary interest in seeing its debtor prevail in litigation with a third party. The decided cases have without exception rejected this contention. *Webb* v. *Town of Eutaw*, 63 So. 687 (Ala. 1913); In re *Farber*, 260 Mich. 652, 245 N.W. 793 (1932).

Related efforts to expand disqualification beyond stockholding in au actual party litigant have met with no success. In *Board of Education of City of Detroit* v. *Getz*, 321 Mich. 676, 33 N.W. 2d 113 (1948), the court held that the fact that the judge was a member of the faculty of the institution for which land was being sought by condemnation did not disqualify him. The Supreme Court of Texas held that ownership of stock by a judge's brother-in-law in a corporation which was a party to the litigation was not grounds for disqualification. *Texas Farm Bureau Cotton Ass'n* v. *Williams*, 300 S.W. 44 (Tex. 1927). The fact that a judge is a taxpayer of a municipality does not disqualify him to hear the municipality's claim of ownership to certain lands. *City of Oakland* v. *Oakland Waterfront Co.*, 50 Pac. 268 (Calif. 1897), or an action brought against the city for some sort of relief, *Prawdzik* v. *City of Grand Rapids*, 313 Mich. 376, 21 N.W. 2d 168 (1946).

The Supreme Court of California rejected an attempted disqualification even though the judge had a definite, if indirect, interest in the pending litigation. The judge there owned stock in a title insurance company which had insured the title of many trust beneficiaries whose interests would fail in the event that the plaintiff in litigation before the judge was successful. *Central Savings Bank of Oakland* v. *Lake*, 257 Pac. 521 (Calif. 1927).

I have found only two cases in which the courts required disqualification even though the judge did not own stock directly in the party litigant. *In re Honolulu Consol. Oil Co.*, 9th Cir., 243 F. 348 (1917), the sitting trial judge had earlier disposed of stock in corporations which had been named defendants in other actions brought by the United States to quiet title to certain oil lands.

The pending action was similar to the other actions, all of them being part of a "unitary plan" on the part of the United States to bring such actions against all California Oil Companies. The issue of damage was identical in all, and the litigation before the judge could have served as a precedent for the remaining ones. Under California law, as it then existed, stockholders remained personally liable for corporate debts even after their stock had been sold. The Court of Appeals held that under these circumstances the judge was disqualified. In *City of Vallejo* v. *Superior Court*, 249 Pac. 1084 (1926), it was held that a judge who was a stockholder in a bank which in turn held the mortgage on property that was the subject of a pending condemnation action in his court was disqualified, even though the bank was not technically a party to the action. It is apparent from the facts of these cases that they have no bearing on Judge Haynsworth's situation in the *Darlington* case.

There is no doubt in my mind that these precedents support the conclusion, equally readily reached on common sense ethical considerations, that Judge Haynsworth ought not to have disqualified himself in the *Darlington* case. While the spirit as well as the letter of the statute and canons must be faithfully applied, questions of disqualification are to be decided in exactly the same manner as a judge decides substantive legal questions which regularly come before him. He must exercise a careful and informed judgment leading him to disqualify himself in those cases in which he has a "substantial interest", and to sit in those cases in which he does not. I am satisfied that Judge Haynsworth adhered to this standard.

Yours very truly,

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

(ATTACHMENT TO REHNQUIST LETTER)

DARLINGTON V. NLRB: SEQUENCE OF PROCEEDINGS

The case arose out of the action of Darlington Manufacturing Company in closing and liquidating its only plant following the victory of the Textile Workers Union of America in a representation election at that plant in 1956. The Board found that both Darlington and Deering-Milliken, Inc., which owned some 40 percent of Darlington's stock, were thereby guilty of an unfair labor practice, and directed that Darlington's employees receive back pay or preferential hiring at other Deering-Milliken mills.

The Court of Appeals, in an opinion by Judge Bryan, refused to enforce the order of the Board, holding that Darlington had an unqualified right to shut down its only plant, regardless of its motive in so doing. The Court further held that even if the Darlington plant be treated as a part of the Deering-Milliken operation, the order nonetheless could not be enforced because an employer had a right to shut down a portion of his business for whatever reason he chose. Judges Haynsworth and Boreman concurred in Judge Bryan's opinion. Chief Judge Sobeloff concurred in a dissenting opinion written by Judge Bell.

Both the union and the Board successfully sought certiorari from the Supreme Court of the United States, which vacated the judgment of the Court of Appeals in *Textile Workers* v. *Darlington Co.*, 380 U.S. 263 (1965). The Supreme Court agreed with the position of the majority of the Fourth Circuit that an employer had a right to completely cease business even if motivated by anti-union animus in so doing, but held that an unfair labor practice could be found to exist if Darlington were regarded "as an integral part of the Deering-Milliken enterprise". The Supreme Court went on to hold that the Board's findings were insufficient to support such a conclusion, and sent the matter back to the Board for further findings.

The Board proceeded to find all of the necessary elements to support the sort of unfair labor practice that the Supreme Court had held could be found under the circumstances, and again sought enforcement of its order in the Court

of Appeals. The case was again heard *en banc* by the court. This time a majority of the court, in an opinion written by Judge Butzner, directed that the Board's order be enforced. Judges Bryan and Boreman dissented, but Judge Haynsworth concurred specially with the majority.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., September 5, 1969.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate.

DEAR MR. CHAIRMAN: Following the nomination of Judge Clement F. Haynsworth to the Supreme Court, news media reports suggested that his interest in Carolina Vend-A-Matic Company at the time he was deciding a case involving, Deering, Milliken, a company with which Carolina Vend-A-Matic had contracts, may have constituted a conflict of interest.

In fairness to Judge Haynsworth, the Senate and the Court, the hearing record should reflect in full detail the nature of Judge Haynsworth's interest in Carolina Vend-A-Matic and this company's business relations with Deering Milliken. Specifically we would like the following information: (1) The Judge's financial interest in and payments received from Carolina Vend-AMatic, or any subsidiary, from 1957 to 1964 in the form of dividends and compensation as an officer, or director, or as a trustee of the company's Profit Sharing and Retirement Plan. (2) The nature of the duties he performed for Carolina Vend-A-Matic after his appointment to the Court of Appeals and an estimate of the time he spent in the execution of these duties. (3) Carolina Vend-A-Matic's customers and the inocme received from each for each year from 1957 to 1964. (4) The percentage of Carolina Vend-A-Matic's business with Deering, Milliken Companies for each year from 1957 to 1964. (5) Carolina Vend-A-Matic's volume of business with Darlington Manufacturing Company and the proportion this comprised of Carolina Vend-A-Matic's entire business with Deering, Milliken Companies during the years the Darlington Mill was in operation. (6) The extent of Judge Haynsworth's knowledge of Carolina Vend-A-Matic contracts with Deering, Milliken at the time of the Darlington Mills Case. (7) Copies of the minutes of the meetings of the Board of Directors and the Executive Committees of Carolina Ven-A-Matic from 1957 to the time Judge Haynsworth sold his stock in the company.

To obviate further speculation, it would be most helpful if Judge Haynsworth would identify the sources and amounts of his income from 1957 to the present, together with a list of his investments, if any, for the same period.

While Judge Haynsworth probably anticipates presenting information bearing on the issue of conflict of interest at the time of his appearance before the committee, it may be helpful, if you feel it appropriate, that he be advised in advance of our desire for the above information. It would be particularly helpful if this information were available prior to the hearing.

Sincerely,

PHILIP A. HART,
JOSEPH D. TYDINGS.

U.S. COURT OF APPEALS,
FOURTH JUDICIAL CIRCUIT,
September 6, 1969.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
Washington, D.C.

MY DEAR SENATOR: I have received hy telephone this morning a copy of the letter addressed to you on yesterday by Senator Hart and Senator Tydings.

To the extent the requested information has relevance, I believe that the requested information is already in your possession in the statement I have filed with you, in the file delivered to you by the Department of Justice, and in the copies of my income tax returns. However, I shall address myself to the Senators' request as best I can.

(1) My financial interest in Carolina Vend-A-Matic and its subsidiaries from 1957 to 1964 is fully detailed in the statement I have previously filed. I never

received any compensation from Carolina Vend-A-Matic or any of its subsidiaries as an officer or as a trusteee of any profit sharing or retirement plan. I did receive compensation from Carolina Vend-A-Matic as a director, and in 1962 my wife received compensation as Secretary. These receipts for the period 1957–1964 are fully disclosed in the copies of the income tax returns filed with you. Since those returns are unavailable to me now, I cannot compile a schedule of those receipts here, but I am sure the staff of your Committee can do so from the tax returns.

(2) I believe the statement previously filed discloses the general nature of my services for Carolina Vend-A-Matic. In supplementation of that statement, however, I may report that there was a weekly luncheon meeting of the board of directors. I attended these meetings when I was in Greenville and not otherwise engaged. At these extremely informal meetings, we considered and discussed weekly cash flow data and problems of financing which were my particular concern. From time to time there were also discussions of personnel and other problems, though I never became directly involved in any of them. After I went on the court I may have handled matters of the renewal and extension of bank credit, though I am not at all certain that I did so. Mr. Dennis handled all arrangements with the bank beginning shortly after his employment.

I rendered no other services to Carolina Vend-A-Matic.

(3) A complete list of the locations of vending machines of Carolina Vend-A-Matic and its subsidiaries and the gross receipts from the machines in each location for the years 1957–1964 could be compiled only from the original books of record of Carolina Vend-A-Matic and its subsidiaries. Those books are in the possession of ARA in Philadelphia, Pennsylvania. I believe it would permit an accountant to have access to them if the Committee wishes it, but such information is not in my capacity to supply immediately.

The file compiled by Judge Sobeloff contains a copy of the proposal made by Carolina Vend-A-Matic to Drayton Mill in December 1963. It contains a list of the forty-six industrial plants in which Carolina Vend-A-Matic then had vending machines installed. These were all full food service operations, in addition to which Carolina Vend-A-Matic had many machines in numerous locations dispensing only coffee, cold drinks or candy. For your convenience, I can reproduce here the list of forty-six industrial plants in which Carolina Vend-A-Matic provided full food vending service in December 1963.

1. Apalache Plant, Greer
2. Bloomsburg Mill, Abbeville
3. Brandon Rayon, Greenville
4. Buffalo Mill, Union
5. Carlisle Finishing Co., Union
6. Central Mill, Central
7. Columbia Nitrogen Corp., Augusta, Ga.
8. Consolidated Trim Co., Union
9. Delta Finishing Co., Cheraw
10. Diehl Manufacturing Co., Pickens
11. Dunlop Corp., Westminster
12. Firth Carpet Co., Laurens
13. Fork Shoals Mill, Fork Shoals
14. F. W. Poe Manufacturing Co., Greenville
15. Gayley Mill, Marietta
16. Greer Mill, Greer
17. Her Majesty Manufacturing Co., Mauldin
18. Homelite, Greer
19. James Fabrics, Cheraw
20. Jeffrey Manufacturing Co., Belton
21. Jonesville Mills, Jonesville
22. Magnolia Finishing Plant, Blacksburg
23. Monaghan Mill, Greenville
24. Mohasco Industries, Liberty
25. Morgan Mills, Inc., Laurinburg, N.C.
26. Oak River Mill, Bennettsville
27. Owens-Corning Fiberglas Corp., Aiken
28. Piedmont Mill, Piedmont
29. Pickens Mill, Pickens

30. Pratt Reed, Central
31. Proctor & Gamble Mfg. Co., Augusta, Ga.
32. Pyle National, Aiken
33. Rocky River Mill, Calhoun Falls
34. Runnymede Corp, Pickens
35. Sangamo Electrical Co., Pickens
36. Sangamo Electrical Co., Walhalla
37. S. C. M. Corp., Orangeburg
38. Selma Hosiery, Dillon
39. Shuron Optical Co., Barnwell
40. Southern Weaving Co., Greenville
41. Torrington, Walhalla
42. Torrington-Clinton Bearing Div., Clinton
43. Union Bleachery, Greenville
44. Union Mill, Union
45. Victor Mill, Greer
46. Woodside Mill, Liberty

(4) I am unable to supply a complete answer to question No. 4 for the same reason I am unable to supply a complete answer to question No. 3. However, I do have audited statements of Carolina Vend-A-Matic and its subsidiaries for the years 1961, 1962 and 1963, which I enclose. The file developed by Judge Sobeloff discloses that the gross receipts from the machines located in Gayley Mill and the Jones Products plant, both Deering Milliken affiliated, approximated $50,000 annually. Those machines were in place in those two plants in each of the years 1961 through 1963. The enclosed audited financial statements show gross sales in 1961 of $1,690,698 and in 1962 of $2,546,046. It thus appears that the gross receipts from machines in plants affiliated with Deering Milliken amounted to slightly less than three per cent of total sales in 1961, and to less than two per cent of total sales in 1962.

The estimated annual gross receipts from machines placed in Magnolia Finishing Plant were approximately $50,000. Tbe gross receipts from the three Deering Milliken affiliated plants, therefore, approximate $100,000 annually. The macbines in Magnolia Finishing Plant were in place during part of 1963 only, and without access to the original books of account, I cannot estimate the proportion of sales from machines in those three plants to total sales in that year. Had Magnolia Finishing Plant been in operation during the whole of 1963 and Carolina Vend-A-Matic's machines had been in place during the whole of that year, however, the sales in the three Deering Milliken affiliated plants would have been slightly more than three percent of the total gross sales of $3,155,102.

(5) Carolina Vend-A-Matic never had vending machines in Darlington Manufacturing Company and, so far as I know, never had any business relation whatever with it.

(6) I cannot say that I never heard prior to December 1963 that Carolina Vend-A-Matic had vending machines in Gayley Mill, in Jonesville Products or in Magnolia Finishing Plant. From time to time there were references to such matters at the luncheon meetings of the directors, and I may have heard some reference to one, two, or all three. The specific locations of vending machines were simply not a matter of interest to me and, as stated before, I was never involved in any way in securing new vending machine locations. Nor, if I had heard that Carolina Vend-A-Matic had vending machines in those three plants, or any of them, can I say that I knew that any one of those plants was related to Deering Milliken. In the Deering Milliken group, there were some seventeen manufacturing corporations in which Deering Milliken, and/or individuals associated with Deering Milliken, owned all or a majority of the stock. (See Darlington Manufacturing Company v. NLRB, 325 F.2d 682, 688, 397 F.2d 760, 764.) I can only say now that when I participated in the hearing and decision of the Darlington case in 1963, I had no conscious awareness of any business relation between Carolina Vend-A-Matic and Deering Milliken affiliates, though, of course, I knew that Carolina Vend-A-Matic had vending machines in a miscellany of manufacturing plants.

Had I known in 1963, however, that Carolina Vend-A-Matic had vending machines in Gayley Mill, Jonesville Products and Magnolia Finishing Plant and that they were Deering Milliken affiliates, I would not have requested Chief

Judge Sobeloff to relieve me of the duty of sitting. A judge has a duty to disqualify himself when there is legal disqualification, but he has an obligation to perform his judicial duty when there is no legal disqualification. I have disqualified myself in all cases in which my former law firm or any of its members were counsel, cases in which certain relatives were counsel, and all cases in which I had a stock interest in a party or in one which would be directly affected by the outcome of the litigation. (Even here, we, on the Fourth Circuit, regard a proportionately insignificant stock interest in a party as not disqualifying if, after being informed of it, the lawyers do not request the substitution of another judge. Thus instances may be found in the books in which judges of the Fourth Circuit owning 100 shares or so of General Motors may be found to have sat in a case involving General Motors. It seems to us inconceivable that any judge of the Fourth Circuit would be influenced by any such interest, and the lawyers involved, when the question has arisen, have not thought so.)

Disqualification is disruptive, however. If a district judge in a small district should refrain from participation in any case in which he conceivably might have a remote interest, or in which friends have an immediate, even an emotional interest, the efficiency of the judicial machinery would be gravely impaired. In a court of appeals it would adversely affect the random selection of panels, for it requires deliberate rearrangement which affects not only the one case involved, but others as well. It is administratively disruptive, and it can cast heavy and uneven burdens upon judges called upon to substitute. In an en banc case 28 U.S.C. § 46(c) requires the participation of every judge of the court in active service who is not disqualified; declination of an active, qualified judge to sit would appear to be a violation of the statute and its purpose. In *Edward v. United States*, 5 Cir., 334 F.2d 360, 362–3, Judge Rives, somewhat regretfully, concluded after reviewing all of the considerations, "In the absence of a valid legal reason, I have no right to disqualify myself and must sit."

(7) This morning I contacted by telephone Mr. Lee F. Driscoll, Jr. of Philadelphia, Pennsylvania, who has possession of the minute books of Carolina Vend-A-Matic and its subsidiaries. He agreed to procure copies of all of the minutes and to transmit them to you. Meanwhile, I received this morning from him extracts from the minute books of Carolina Vend-A-Matic and its subsidiaries showing their officers and directors. For the possible convenience of the Committee, these sheets are attached.

(8) The sources and amounts of my income from 1957 through 1968 are fully disclosed in the copies of my income tax returns which have been filed with you. Without present access to them, I am unable to prepare schedules which would recapitulate that information. I have prepared and I attach hereto a list of my current investments.

(9) I am informed that since my sale of the stock of ARA received in exchange for my stock in Carolina Vend-A-Matic, (i) Carolina Vend-A-Matic has been ejected from Gayley Mill as a result of some dissatisfaction on the part of the plant-manager; (ii) that Jonesville Products Plant was sold and is no longer an affiliate of Deering Milliken. (iii) While Carolina Vend-A-Matic now serves only one Deering Milliken affiliated plant that it served in 1963, it serves ten others, one of which was a result of an acquisition of an existing supplier, the other nine having been obtained as a result of competitive bidding. I am further told by one of my former associates in Carolina Vend-A-Matic that Deering Milliken has maintained a record of all vending machine bids and proposals and a record of its own data showing the basis of its selection of one of the bidders. I am further informed that if any such information should be of interest to the Committee, it may be obtained from Hal C. Byrd of Deering Milliken Research Corporation, Spartanburg, South Carolina.

This supplemental statement, together with my earlier statement and the file compiled by Judge Sobeloff and the copies of my tax returns, supplies as fully as I can with the materials to which I have access the answers to the questions suggested by Senators Hart and Tydings.

Finally, I hope the Committee now has all the information it needs, but if there is anything else you wish me to supply, I will be happy to undertake to do it.

Respectfully,

CLEMENT F. HAYNSWORTH, Jr.

Investments owned by Clement Furman Haynsworth, Jr., September 1969

	Number of shares of stock
Allied Chemical Corp	108
American General Insurance Co	201
Brunswick Corp.	1,000
Burlington Industries, Inc	400
Business Development Corp. of South Carolina	10
Chrysler Corp.	119
Cole Drug Co., Inc	600
Computer Servicenters, Inc	500
Dan River Mills	1,575
Fairchild Camera & Instrument Corp	100
Georgia-Pacific Corp	5,238
Government Employees Financial Corp	106
Government Employees Life Insurance Co	110
W. R. Grace & Co	300
Greenville Memorial Gardens	72
G & W Land and Development Corp	18
Gulf & Western Industries	346
Insurance Securities, Inc	100
International Tel. & Tel. Corp	200
The Investment Life & Trust Co	321
Ivest Fund, Inc	802,925
Jefferson-Pilot Corp.	250
Leverage Fund of Boston, Inc. (capital)	350
The Liberty Corp. (common)	9,523
The Liberty Corp. (voting preferred stock 40 cent convertible series)	337
Main-Oak Corp	31
Monsanto Chemical Co	219
MGIC Investment Corp	630
Multimedia, Inc. (common)	11,728
Multimedia, Inc., 5 percent convertible cumulative preferred stock	2,932
Mutual Savings Life Insurance Co	240
Nationwide Corp	500
Nationwide Life Insurance Co	20
Owens-Corning Fiberglas Corp	100
Peoples National Bank	330
Piedmont Natural Gas Co., Inc	60
The Rank Organization, Ltd	500
Scope, Inc	120
Sonoco Products Co	284
South Carolina National Bank	768
Southern Weaving Co	287
Sperry Rand Corp	400
J. P. Stevens & Co	550
Synalloy Corp	52
Tenneco, Inc	200
United Nuclear Corp	104

Debentures

	Amount
Government Employees Financial Corp., convertible subordinated 5½ percent	$350
Government Employees Financial Corp., convertible subordinated 5¼ percent	550
W. R. Grace & Co., subordinate debenture 4¼ percent	1,700

Bonds

Calhoun-Charleston, Tenn., Utility District	4,000
Clemson, S.C., general obligation sewer	5,000
Greenville County, S.C., hospital	5,000
Piedmont Park F/D Gv. Co	20,000
Greater Greenville Sewer District	4,000
Town of Williston, S.C	4,000
Pickens, S.C., waterworks system improvement revenue	4,000
Greenville waterworks system	10,000

REAL ESTATE

A one-seventh undivided interest in a tract of land upon which there is a warehouse known as ARA Warehouse, from which my net taxable income in 1968 was $548.

A one-fifth undivided interest in a small tract of land on which there is a small warehouse known as Lowndes Hill Warehouse, from which my net taxable income in 1968 was $343.

CAROLINA VEND-A-MATIC CO.

April 5, 1950 First Meeting of Subscribers and Stockholders, directors elected: Eugene Bryant, W. Francis Marion, R. E. Houston, Jr., Christie C. Prevost, Vincent G. Williams, John Mahoney and Clement F. Haynsworth, Jr.

April 5, 1950 First Board of Directors Meeting, officers elected: Pres., Eugene Bryant; Vice-Pres., R. E. Houston, Jr.; Vice-Pres., Vincent G. Williams; Secretary, W. Francis Marion; Treasurer, Christie C. Prevost.

January 9, 1951 Annual Stockholder Meeting Directors elected: Eugene Bryant, R. E. Houston, W. Francis Marion, Christie C. Prevost and Clement F. Haynsworth, Jr.

January 9, 1951 Annual Board of Directors ("B of D") Meeting, officers elected: Pres., Eugene Bryant; Vice-Pres., R. E. Houston, Jr.; Vice-Pres., Clement F. Haynsworth, Jr.; Secretary, W. Francis Marion; Treasurer, Christie C. Prevost.

January 8, 1952 Annual Stockholders Meeting, same directors elected.

January 8, 1952 Annual B of D Meeting, same officers elected.

January 13, 1953 Annual Stockholders Meeting, same directors elected but Mrs. R. E. Houston, Jr. to act as alternate director when necessary.

January 13, 1953 Annual B of D Meeting, same officers elected.

January 13, 1954 Annual Stockholders Meeting, same directors elected.

January 13, 1954 Annual B of D Meeting, same officers elected.

January 10, 1955 Annual Stockholders Meeting, same directors elected.

January 10, 1955 Annual B of D Meeting, same officers elected.

January 9, 1956 Annual Stockholders Meeting, same directors elected.

January 9, 1956 Annual B of D Meeting, same officers elected.

NOTE.—There are no minutes of either an annual stockholders meeting or B of D meeting in January of 1957.

May 29, 1957 Special Stockholders Meeting, recognition that there had been resignations by Eugene Bryant as President and Director and R. E. Houston, Jr. as Vice President and Elizabeth Houston as Director.

Buck Mickel, George McDougall and Wesley Davis elected Directors to serve with already elected Directors, W. Francis Marion, Christie C. Prevost, and Clement F. Haynsworth, Jr.

May 29, 1957 Special B of D Meeting, officers elected: Pres., W. Francis Marion; Vice-Pres., Wesley Davis; Vice-Pres., Clement F. Haynsworth, Jr.; Secretary, George McDougall; Treasurer, Christie C. Prevost.

January 14, 1958, Annual Stockholders Meeting, same directors elected.

January 14, 1958, Annual B of D Meeting, officers elected: Pres., W. Francis Marion; Vice-Pres., Buck Mickel; Vice-Pres., Wesley Davis; Vice-Pres., Clement F. Haynsworth, Jr.; Secretary, George McDougall; Treasurer, Christie C. Prevost.

January 13, 1959, Annual Stockholders Meeting, same directors elected.

January 13, 1959, Annual B of D Meeting, same officers elected.

January 12, 1960, Annual Stockholders Meeting, directors elected: W. Francis Marion, Buck Mickel, J. Wesley Davis, C. F. Haynsworth, Jr., George E. McDougall, Christie C. Prevost, and Wade H. Dennis.

January 12, 1960, Annual B of D Meeting, same officers elected except that Wade H. Dennis is added as a vice-president.

January 10, 1961, Annual Stockholders Meeting, same directors elected.

January 10, 1961, Annual B of D Meeting, same officers elected.

January 9, 1962, Annual Stockholders Meeting, same directors elected.

January 9, 1962, Annual B of D Meeting, officers elected: Pres., W. Francis Marion; Vice-Pres., Buck Mickel; Vice-Pres., J. Wesley Davis; Vice-Pres., C. F. Haynsworth, Jr.; Vice-Pres., George E. McDougall; Vice-Pres., Wade H. Dennis; Secretary, Dorothy M. Haynsworth; Treasurer, Christie C. Prevost.

January 8, 1963, Annual Stockholders Meeting, same directors elected.

January 8, 1963, Annual B of D Meeting, same officers elected.

October 21, 1963, Weekly B of D Meeting, resignation of Clement F. Haynsworth, Jr., as Director is accepted as of October 31, 1963. He remains a stockholder. The Minutes refer to a letter stating his reasons but such a letter is not found in the Minutes.

January 14, 1964, Annual Stockholders Meeting, directors elected: Wesley Davis, Wade H. Dennis, W. Francis Marion, Buck Michel, George McDougall, and Christie C. Prevost.

January 14, 1964, Annual B of D Meeting, officers elected: Pres., Wade H. Dennis; Vice-Pres., Buck Mickel; Vice-Pres., Wesley Davis; Vice-Pres., W. Francis Marion; Vice-Pres., George E. McDougall; Treasurer, Christie C. Prevost; Secretary, William S. Mullins; Assist. Secretary, Mary Frances Dennis.

NOTE.—At weekly B of D meeting on April 6, 1964, resolution was passed that certain property be leased from C. F. Haynsworth, Jr., and some of the present Directors and Officers of the Company.

April 8, 1964 Special B of D Meeting, resignations of W. Francis Marion as Director and Vice-President and Mary Frances Dennis as Asst. Secretary were accepted.

Additional Officers elected: Vice-Pres. James F. Hutton; Asst. Secretary, Lee F. Driscoll, Jr., Asst. Treasurer, Edwin W. Keleher.

January 12, 1965 Action of Shareholder By Consent, directors elected: Herman G. Minter, James F. Hutton and David D. Dayton.

January 12, 1965 Action of B of D By Consent, officers elected: Pres., James F. Hutton; Vice-Pres., Wade H. Dennis; Vice-Pres., Roy Gramling; Secretary, Lee F. Driscoll, Jr.; Treasurer, Herman G. Minter; Asst. Treasurer, Edwin W. Keleher.

January 12, 1966 Action of Shareholders By Consent, same Directors elected.

December 1, 1966 Action of B of D By Consent, same Officers elected.

December 15, 1967 Action By Shareholder By Consent, directors elected: Herman G. Minter, David D. Dayton and James F. Wanink.

December 15, 1967 Action of B of D By Consent, officers elected: Pres., James F. Wanink; Vice-Pres., David D. Dayton; Vice-Pres., Wade H. Dennis; Treasurer, Herman G. Minter; Secretary, Lee F. Driscoll, Jr.; Asst. Treasurer, James A. Rost; Asst. Secretary, Henry T. Dechert.

May 27, 1968 Action of B of D By Consent, Harry S. Glick elected as Asst. Treasurer.

VENDING CO.

July 2, 1956 Meeting of Subscribers to Capital Stock, directors elected: Eugene Bryant, C. F. Haynsworth Jr., R. E. Houston, Jr.; W. Francis Marion and Christie C. Prevost.

July 2, 1956 Directors Meeting, officers elected: Pres., Eugene Bryant; Vice-Pres., C. F. Haynsworth, Jr.; Vice-Pres., R. E. Houston, Jr.; Secretary, W. Francis Marion; Treasurer, Christie C. Prevost.

January 8, 1957 Annual Stockholders Meeting, same directors elected.

January 8, 1957 Annual Board of Directors ("B of D") Meeting, same officers elected.

May 29, 1957 Special Stockholders Meeting, resignations by Eugene Bryant as a Director and President, by R. E. Houston, Jr., as Vice President, and by Elizabeth W. Houston as a Director (alternate) were noted.

Buck Michel, George E. McDougall and J. Wesley Davis, were elected to serve with already elected Directors, W. Francis Marion, C. F. Haynsworth, Jr. and Christie C. Prevost.

May 29, 1957 Special B of D Meeting, officers elected: Pres., W. Francis Marion; Vice-Pres., Buck Mickel; Vice-Pres., J. Wesley Davis; Vice-Pres., C. F. Haynsworth, Jr.; Secretary, George S. McDougall; Treasurer, Christie C. Prevost.

January 14, 1958 Annual Stockholders Meeting, same Directors elected.

January 14, 1958 Annual B of D Meeting, same Officers elected.

January 13, 1959 Annual Stockholders Meeting, same directors elected.

January 13, 1959 Annual B of D Meeting, same officers elected.

January 12, 1960 Annual Stockholders Meeting, directors elected: W. Francis Marion, Buck Mickel; J. Wesley Dais, C. F. Haynsworth, Jr.; George E. McDougall; Christie C. Prevost, and Wade H. Dennis.

January 12, 1960 Annual B of D Meeting, same officers elected except that Wade H. Dennis is added as a Vice President.

January 10, 1961 Annual Stockholders Meeting, same directors elected.
January 10, 1961 Annual B of D Meeting, same officers elected.
January 9, 1962 Annual Stockholders Meeting, same directors elected.
January 9, 1962 Annual B of D Meeting, officers elected: Pres., W. Francis Marion; Vice-Pres., Buck Mickel; Vice-Pres., J. Wesley Davis; Vice-Pres., C. F. Haynsworth, Jr., Vice-Pres., George E. McDougalll; Vice-Pres, Wade H. Dennis; Secretary, Dorothy M. Haynsworth; Treasurer, Christie C. Prevost.
January 8, 1963 Annual Stockholders Meeting, same director elected.
January 8, 1963 Annual B of D Meeting, same officers elected.
Octoher 21, 1963 Regular B of D Meeting, resignation of Clement F. Haynsworth, Jr. as a Director was accepted as of 10–31–63.
January 14, 1964 Annual Stockholders Meeting, directors elected: Wesley Davis, Wade H. Dennis; W. Francis Marion, Buck Mickel; George McDouglall and Christie C. Prevost.
January 14, 1964 Annual B of D Meeting, officers elected: Pres., Wade H. Dennis; Vice-Pres., Buck Mickel; Vice-Pres., Wesley Davis; Vice-Pres., W. Francis Marion; Vice-Pres., George E. McDougall; Treasurer, Christie C. Prevost; Secretary, William S. Mullins; Asst. Secretary, Mary Francis Dennis.
All qualifying shares held hy directors were canceled and new shares issued to Carolina Vend-A-Matic Co.
April 8, 1969 Special B of D Meeting, resignations of W. Francis Marion as a Director and Vice-President and of Mary Francis Dennis as Assistant Secretary were noted.
Additional Officers elected: Vice-Pres., James F. Hutton; Asst. Secretary, Lee F. Driscoll, Jr., Asst Treasurer, Edwin W. Keleher.
January 12, 1965 Action of Shareholder hy Consent, directors elected: James F. Hutton, Herman G. Minter and David D. Dayton.
January 12, 1965 Action of B of D By Consent, officers elected: Pres., James F. Hutton; Vice-Pres., Wade F. Dennis; Vice-Pres., Ray Gramling; Vice-Pres., David D. Dayton; Secretary, Lee F. Driscoll, Jr.; Treasurer, Herman G. Minter; Asst. Treasurer, E. W. Keleher.
December 15, 1967 Action By Sole Shareholder By Consent, directors elected: Herman G. Minter; David D. Dayton; and James F. Wanik.
December 15, 1967 Action of B of D By Consent, officers elected: Pres., James F. Wanik; Vice-Pres., David D. Dayton; Vice-Pres., Wade H. Dennis; Treasurer, Herman G. Minter; Secretary, Lee F. Driscoll, Jr.; Asst. Treasurer, James A. Rost; Asst. Secretary, Henry T. Dechert.
May 27, 1968 Action of B of D By Consent, Harry S. Glick elected as an Assistant Treasurer.

VEND CO. OF GEORGIA

October 31, 1962 Meeting of Suhscribers to Capital Stock, directors elected: W. Francis Marion, Buck Mickel; J. Wesley Davis, C. F. Haynsworth, Jr.; George E. McDougall, Christie C. Prevost, and Wade H. Dennis.
November 1, 1962 First Board of Directors ("B of D") Meeting, Officers elected: Pres. and G.M. Wade H. Dennis; Vice-Pres. and Sec.-Treas. William S. Mullins.
January 8, 1963 Annual Stockholders Meeting, Same Directors elected.
January 8, 1963 Annual B of D Meeting, same Officers elected.
October 21, 1963 Regular B of D Meeting, resignation of Clement F. Haynsworth, Jr. as Director is accepted as of October 31, 1963.
January 14, 1964 Annual Stockholders Meeting, directors elected: Wesley Davis: Wade H. Dennis; Buck Mickel; George McDougall; and Christie C. Prevost.
January 14, 1964 Annual B of D Meeting, same officers elected.
April 8, 1964 Special B of D Meeting, resignation of W. Francis Marion as a Director accepted.
Additional Officers elected: Vice-Pres. James F. Hutton; Asst. Secretary, Lee F. Driscoll, Jr.; Asst. Treasurer, Edwin W. Keleher.
June 12, 1964, Vend Co. of Georgia merged into Carolina Vend-A-Matic Company with the latter surviving.

VEND CO. OF NORTH CAROLINA

May 13, 1963 Organizational Meeting of Shareholders, directors elected: Wesley Davis, Wade H. Denis, W. Francis Marion, Buck Mickel, George McDougall, and Christie C. Prevost.

May 13, 1963 First Board of Directors ("B of D") Meeting, officers elected: Pres. and G.M., Wade Dennis; Vice-Pres. and Sec.-Treas., William S. Mullins.

October 21, 1963 Regular B of D Meeting, resignation of Clement F. Haynsworth, Jr. as a director is accepted as of October 31, 1963. (NOTE: This is confusing because here is no record he was elected as a director.)

January 14, 1964 Annual Stockholders Meeting, same directors elected.

January 14, 1964 Annual B of D Meeting, same officers elected.

April 8, 1964 Special B of D Meeting, resignation of W. Francis Marion as Director accepted.

Additional officers elected: Vice-Pres., James F. Hutton; Asst. Secretary, Lee F. Driscoll, Jr., Asst. Treasurer, Edwin W. Keleher.

June 12, 1964 Vend Co. of North Carolina mrgd in

June 12, 1964 Vend Co. of North Carolina merged into Carolina Vend-A-Matic Company with the latter surviving.

U.S. COURT OF APPEALS,
FOURTH JUDICIAL CIRCUIT,
September 15, 1969.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
Washington, D.C.

MY DEAR SENATOR: Since I wrote to you last week, Automatic Retailers of America, Inc. has advised me that the original books of account of Carolina Vend-A-Matic are preserved in the office of ARA in Greenville, S.C., rather than in Philadelphia as I earlier reported. In its letter to me, ARA has offered to make the records available should the Committee want to examine them. I am enclosing herewith a copy of ARA's September 12, 1969 letter.

You will note from that letter that the ARA Regional Manager points out some variances in the subsequent development of the business of ARA and Deering Milliken plants from the information I earlier reported to you.

I am informed that the Carolina Vend-A-Matic records contain monthly sales data from which annual sales at each location can be computed during each of the years 1957–1964. This information, however, is contained in a mass of other data. I had a member of my staff inspect the records, and it is reported to me that it will take a number of man days to compile the available records of annual sales by locations during each of the years 1957 through 1964, as requested by Senators Hart and Tydings. I do not have the staff to assign to such a task, but I wish to report the circumstances of the availability of such information, if the Committee wishes it developed.

I will be glad to have my staff assist in compiling such information if the Committee wisbes to undertake the task, but it seems beyond my immediate capacity to develop myself.

Respectfully and sincerely,

CLEMENT F. HAYNSWORTH.

(Attachment to Haynsworth letter)

AUTOMATIC RETAILERS OF AMERICA, INC.,
Atlanta, Ga., September 12, 1969.

HON. CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, U.S. Circuit Court of Appeals,
Fourth Judicial Circuit,
Greenville, S.C.

DEAR JUDGE HAYNSWORTH: Pursuant to your request, we are making available to you the original records which would show the list of customers and total sales figures of Carolina Vend-A-Matic (now a part of ARA Services, Inc.) for the years 1957 to the date of the merger of Carolina Vend-A-Matic into ARA in 1964.

These records, which were originally thought to be in ARA's headquarters in Philadelphia, were located in the Greenville, South Carolina ARA plant. It is our understanding that this information was requested by the Committee on the Judiciary of the United States Senate. We are releasing these records solely for the purpose of their use before the Committee, and we would respectfully request that none of the material that we make available be made public in any

manner unless it is absolutely necessary. These are confidential business records which could have value to our competitors and are not the type of records ordinarily considered to be public information.

In the event that additional corporate records are required by the Committee, such as the tax returns, or audited statements of Carolina Vend-A-Matic, we would again request that this information not be publicly disclosed.

I have read your letter of September 6, 1969 addressed to The Honorable James O. Eastland, Chairman of the Committee on the Judiciary and have only two comments to make. First, you are correct in stating that Carolina Vend-A-Matic never had any business relations with the Darlington Manufacturing Company. Secondly, for the purpose of clarification, the history of the relationship between ARA and Deering Milliken since the date of the merger, and according to our best information, is as follows:

1. ARA now serves eleven (11) Milliken accounts.
2. At the time of the merger, Carolina Vend-A-Matic served three (3) Milliken accounts, Gayley, Magnolia, and Jonesville Products.
3. At the time of the merger, ARA was serving six (6) Milliken accounts.
4. Since the merger, ARA has obtained six (6) additional Milliken accounts on a competitive bid basis; and purchased from an existing independent vendor the account in another Milliken plant, Judson Mills. This purchase was made approximately two years ago in an arm's length transaction between ARA and the existing vendor.
5. Since the date of the merger, we no longer serve five (5) Milliken accounts for various reasons. Two of these, Gayley Mill, and Jonesville Products, were existing accounts from Carolina Vend-A-Matic. We voluntarily severed relations with Jonesville Products but were terminated by Gayley Mill for the reason stated in your letter to Senator Eastland. The other three were existing accounts of ARA at the time of the merger.
6. In the course of our normal business transactions, we have solicited and unsuccessfully bid on a number of other Deering Milliken accounts since the merger. All of these were on a competitive basis.

In light of the above information, you may want to revise paragraph (9) of your letter to Senator Eastland.

Yours very truly,

ARA SERVICES, INC.,
WADE H. DENNIS, *Regional General Manager.*

The CHAIRMAN. Now, I would like to have an executive session for just a minute.

(Short recess.)

The CHAIRMAN. Let us have order, please.

Senator Hruska?

Senator HRUSKA. Mr. Chairman, I ask unanimous consent to insert a brief statement with reference to Judge Haynsworth's nomination. I shall not take the time of the committee or of the witness to read it, but it bears on some of the actions that were taken preliminary to the hearing here, and I ask unanimous consent that it be inserted in the record at this point.

The CHAIRMAN. Without objection, it will be admitted.

(The statement follows:)

STATEMENT OF ROMAN L. HRUSKA, AT HEARINGS ON THE NOMINATION OF CLEMENT F. HAYNSWORTH, JR., TO BE ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

Mr. Chairman, it is my pleasure to participate in this hearing on the nomination of Clement F. Haynsworth, Jr., to be Associate Justice of the United States Supreme Court.

The position of Associate Justice is one of the highest to which a man can rise. Once appointed, a Justice can hold the office for life, or for good behavior. He is granted an independence in his official conduct that is equalled no where else in the Government. It is quite necessary, and proper, therefore, to carefully scrutinize any nomination which comes before the Senate for its advice and consent.

This is why, before the hearing, I have very carefully reviewed all of the information available to me. This is why I participated with the Chairman in the release of information contained in the files of the Department of Justice and why I released correspondence between Assistant Attorney General Rehnquist and myself. This information contained facts and opinions, from authoritative sources, that had a direct bearing on this hearing. I hope the public and the members of this Committee have had the time to digest this information.

The point I wish to make in my statement today has been documented in the Department of Justice file and in the Assistant Attorney General's opinion. It is this: The charges, allegations, and insinuations regarding the propriety of participation by Judge Clement F. Haynsworth in the case of *Darlington Manufacturing Company* vs. *National Labor Relations Board*, 325 F2d, are uttely baseless.

It is clear that Judge Haynsworth owned no stock in any company that was a litigant in the case, he had no financial interest in the outcome of the litigation, and he could not have been actuated or motivated by any hope of pecuniary gain.

Mr. Chairman, I ask unanimous consent that my letter of September 2, 1969, addressed to the Attorney General and the September 5, 1969, reply of Assistant Attorney General Rehnquist be printed in the hearing record.

Quoting briefly from Mr. Rehnquist's letter at Page 6, he states that:

"Disqualification where required by statute or by the Canons of Ethics is a judge's undoubted duty. But the disruptive consequences of disqualification, which may be readily borne in order to insure fairness where the judge does have a 'substantial interest' in the litigation, should not be borne in order to gratify the desire on the part of either a litigant or of the judge himself that the judge not sit when he does not have such a substantial interest."

Finally, he concludes on page 12:

"There is no doubt in my mind that these precedents support the conclusion, equally readily reached on common sense ethical considerations, that Judge Haynsworth ought not to have disqualified himself in the *Darlington* case."

I am sure, Mr. Chairman, that each member of the Committee seeks to approve for the Supreme Court nomination a man for judicial temperment, balance, impartiality and fairness. Judge Haynsworth has demonstrated these characteristics.

There is one other extremely importaut point concerning these hearings which I wish to make. It is the duty of the Committee and the Senate, in my opinion, to examine the integrity, training, experience, ability, and temperment of the nominee. When satisfied on each of these counts, it is our duty to advise and consent to his nomination.

Whether the nominee is liberal or conservative should not concern this Committee. Whether we agree or disagree with him is not the issue. Political questions should play no part in our decision.

This is the position I have taken consistently since I began service on the Judiciary Committee. In that time, six or seven nominees for the Supreme Court have been approved by this Committee, and I supported each decision regardless of the philosophy of the nominee. Numerous circuit and district judges have been approved hy this Committee, also with my support on this same basis.

This Committee also spoke on the subject of philosophy. In the Executive Report on the nomination of Justice Marshall, the Committee stated the issue and answered it as follows:

"The opposition to the nomination turns on the allegation that Judge Marshall is too liberal in his philosophy and would upset the balance on the Court. Judge Marshall believes in the Constitution of the United States and the separation of powers. He believes deeply in and respects the oaths of office to which he has subscribed twice and to which he must subscribe again." (Page 3, Ex. Rpt. 13, 90th Congress, 1st Session, 1967)

It is my intention, Mr. Chairman, at the appropriate time, to vote to report this nomination favorably to the full Senate and to support the nomination on the Senate floor.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman and gentlemen of the committee, I am honored to be here today to join in presenting to you a distinguished South Carolinan who has been appointed to the Supreme

Court of the United States. Judge Haynsworth was born in Greenville, S.C., in 1912. He attended the schools there. He graduated from Furman University in 1933 summa cum laude, with highest honors. He graduated from Harvard Law School in 1936. From 1936 to 1953, he practiced with the firm of Haynsworth & Haynsworth; a firm established by his forefathers and he is of the fifth generation of distinguished and illustrious lawyers who bear that name. Two years of that time he served in the U.S. Navy during World War II. For 2 additional years he served with the Regional Wage Stabilization Board. From 1953 to 1957 he practiced with the firm of Haynsworth, Perry, Bryant, Marion & Johnstone.

Judge Haynsworth's firm expanded and became the largest law firm in South Carolina. It was known over the Nation as one of the most reliable, one of the most capable, and one of the best.

In 1957 Judge Haynsworth was appointed to the circuit court of appeals. He is now its chief judge. His record speaks for itself. He has made an able and a scholarly judge. He has handed down decisions which no fair and just and honorable man should oppose. The decisions of Judge Haynsworth during his term on the court demonstrate that he is a jurist whose judicial mind does not reside at either extreme of the spectrum but his treatment of various issues of law presented before him have been balanced. Let us be reminded at this point that the scales of justice are balanced and are not artificially weighed in favor of either the right or the left but are even and balanced. So we find Judge Haynsworth's decisions and his judicial philosophy to be balanced and even.

Upon the basis of my personal knowledge of this gentleman—and I know personally firsthand of his great ability as a lawyer and as a judge for when I was a circuit judge he tried cases before me—I can say that he's one of the finest lawyers in the country. He is a gentleman. He is a scholar. He has been a distinguished chief judge and member of the fourth circuit court of appeals. It is with great pleasure that I join in presenting this great American to you today for your careful consideration and recommend his approval by this body to be on the Supreme Court of the United States.

The CHAIRMAN. Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Mr. Chairman and distinguished colleagues, one would assume at a confirmation hearing that the nominee would be presented first with a biography of degrees and a listing of his positions of trust and honor, and then would come a parade of lawyers and bar associations in endorsement. But the game has changed. When Judge Haynsworth was rumored for appointment, immediately special interests started pressuring him. Weeks ago they drove into his home State, into his hometown, searching for embarrassment and adversity. Law students were put to reading every article or statement emitting from the judge as well as his decisions. A miscue in the announcement of his appointment led to further adverse editorials and conjecture that the President had finally discovered a blemished rec-

ord and would not appoint, so that when the President finally called the judge telling that he was sending the judge's name to the Senate as an Associate Justice of the U.S. Supreme Court, there was an eerie feeling that perhaps he had been indicted rather than appointed. On last week, when the confirmation hearing were delayed due to the death of our distinguished colleague, it was reported in the news that the opposition had gained strength. With a week's more work, they could learn that 12 years ago the judge had been a member of a large law firm in the textile Piedmont in South Carolina, where many northern industries had expanded. Now the judge was endowed with the heinous appellation of "Mr. Southern Textile."

Now, as his Senator, I find that in presenting him, I must defend him. I do so with pride, because I first suggested him to President Nixon last May. But this is not totally accurate. Actually, the judge's record of achievement has been suggesting him for the highest judgeship for some time, and to the President's credit, he was the first to recognize it.

Judge Haynsworth comes with neither a party label nor a label of philosophy. After outstanding academic accomplishment at Furman University and Harvard Law School, and after 32 years of practice before the bar, for the past 12 years now he has labored in the vineyards of the judicial branch. For this, the New York Times has labeled him "obscure." Appellate judges hardly make headlines. In fact, they are not supposed to. In accordance with the doctrine of stare decisis, the intermediate circuit court must hew the line of Supreme Court decisions. But, as Senator Tydings of your committee will tell you, no one has been more assiduous in the advancement of the administration of justice than Chief Judge Haynsworth of the Fourth Circuit Court of Appeals. He is considered by his peers on the bench and scholars of the law as being in the vanguard for the improvement of our judicial machinery. Judge Haynsworth has not won his promotion for outstanding backdoor politics at the White House. Rather, he is promoted for his excellent record as a judge.

The question of conflict of interest has been raised. The facets of the alleged conflict have been detailed in a letter by two distinguished members of your committee so that we can review the records and minutes of the company involved and learn to the penny what Judge Haynsworth may or may not have received. We can learn the judge's interest. The judge will answer each point question by question, with his complete income tax returns for the years 1957 through last year filed with the committee.

We should know the statutes and the canons involved.

The statute, 28 United State Code 455, provides that:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party of his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Canon 29 of the American Bar Association Canons of Judicial Ethics, states:

> A judge should abstain from performing and taking part in any judicial act in which his personal interests are involved . . .

Canon 26 of the American Bar Association Canons of Judicial Ethics, states:

A judge should obtain from making personal investments in enterprises which are apt to be involved in litigation in the courts; and, after his accession to the bench, he should not retain such investment previously made, longer than a period sufficient to enable him to dispose of them without serious loss.

Of course there is no conflict of interest. The vending company which the judge helped organize as an attorney was not a party before him, and its doing business with Deering Milliken I am sure you will find constituted a remote interest rather than a substantial interest. The judge made no investment "apt to be involved in litigation" as outlined in Canon 26, and in accordance with Canon 29, the Judge's sitting on the *Darlington* case did not involve his "performing and taking part in any judicial act in which his personal interests are involved."

The judge's duty to sit on a case is equal to the duty not to sit. Too often judges excuse themselves trying to avoid hard or distasteful decisions. We who have not served on the judiciary are not familiar with this problem, but in federal practice: "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason" not to; *Edwards* v. *United States*, in the fifth circuit. Judge Haynsworth does not take the ethic, the canon, or the requirement of the statutes lightly. And I am sure if asked today would he sit on the case on which the alleged conflict occurred, he would state: "Yes, there would be a clear duty to do so." No Senator would refuse to vote on income tax reform because he paid income tax, and no judge would expect to excuse himself from a telephone case because he had a telephone in his home and office. But those unfamiliar with canons and the Federal practice have already crowed: "Judge in violation of canons for past 10 years." This is definitely in error.

There is no more eminent authority on judicial ethics than Prof. John P. Frank, formerly of Yale University, and now of Phoenix, Ariz. He is here and will testify, and I am sure he will explain to your satisfaction the judge's duty to sit on the case.

Now, in the light of the several weeks' endeavor to embarrass and chastise, it is significant that the powerful organizations arrayed to oppose the judge have failed where they have tried hardest. There is no better testimonial for your confirmation. The AFL–CIO, for example, cannot produce an AFL–CIO attorney of significance from South Carolina to say that the judge is antilabor. On the contrary, some of labor's best in South Carolina will appear in Judge Haynsworth's behalf. The NAACP, at the national level, mind you, initiated a movement back at the local level. However, the chief attorney for the NAACP for South Carolina, Mr. Matthew Perry, when first hearing of Judge Haynsworth's appointment, made this comment, and I quote: "Not upset in any way." I am sure that Mr. Perry would not appear before this committee and call the judge a racist. And the eminent civil rights authority, Dean William Foster, of the University of Wisconsin School of Law, has stated to our colleague, Senator Nelson, that "the charges that Judge Haynsworth is a segregationist are clearly without merit or support and his record shows him to be

a man capable of being responsive to the needs and changes demanded by our legal machinery." The ADA will make its headlines in opposition, but its oldest and most active member in South Carolina, Mr. John Bolt Culbertson, of Greenville, will testify in Judge Haynsworth's behalf. Presently, Mr. Culbertson is also counsel for the Textile Workers Union of America. It was the TWUA that has been hollering and shouting to the rooftop: "conflict of interest." They did not tell you at the time—and this had not gained the headlines—Attorney General Robert Kennedy had this charge thoroughly investigated, found it wanting, and expressed complete confidence in Judge Haynsworth. They did not tell you that they apologized for raising the question in the first place; and they don't tell you that those representing the TWUA in South Carolina who know Judge Haynsworth are here in the judge's behalf.

And those who would claim Judge Haynsworth's lack of interest and compassion for the individual due to Judge Haynsworth's private corporate practice should know that we who practice criminal law and are on the plaintiff's side of the fence consider Judge Haynsworth eminently fair. Louis B. Fine, president of the Trial Lawyers Association of Virginia, is present today in support of Judge Haynsworth.

I bring these matters out in my introduction in fairness to the Senate and the public, and in fairness to Judge Haynsworth. I feel strongly that President Nixon has made a brilliant addition to the Court. Judge Haynsworth will give balance where balance is needed. His personal and official conduct has always been of the highest character, decorum, and ethic. Since questions have been raised, the Senate owes it to all that these matters be fully aired and all charges fully cleared. Judge Haynsworth would want it no other way.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, sir.

Are there any questions?

Judge Haynsworth, will you stand up.

Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Judge HAYNSWORTH. I do.

Senator HOLLINGS. We leave him to the briar patch now.

The CHAIRMAN. I think you ought to change seats and be in front of one of those mikes.

Give us your name and position you now occupy.

TESTIMONY OF HON. CLEMENT F. HAYNSWORTH, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge HAYNSWORTH. I am Clement Furman Haynsworth, Jr. I am now the chief judge of the U.S. Court of Appeals for the Fourth Circuit.

The CHAIRMAN. Judge, did you ever hear of a company named Carolina Vend-A-Matic?

Judge HAYNSWORTH. I have heard a great deal of it, yes, sir.

The CHAIRMAN. When was it organized?

Judge HAYNSWORTH. In 1950, Mr. Chairman.

The CHAIRMAN. Who organized it?

Pull that mike up a little, please.

Judge HAYNSWORTH. Several members of my law firm and a businessman who was a friend of ours. At the outset for a few months there were two others in it, too, but they quickly dropped out. Essentially, they were people in my law office and a businessman friend.

The CHAIRMAN. Now, what was the nature of its business?

Judge HAYNSWORTH. At the outset it bought and placed machines to vend coffee, and they were placed in bus stations, post offices, a variety of locations like that. And they were vending coffee.

The CHAIRMAN. Well, did it grow much in those early years?

Judge HAYNSWORTH. Senator, it did, and the rate of growth was increased and it began to grow very greatly when industrial plants began to turn to machines to dispense food to employees in industrial plants. And then it had a very tremendous expansion as did as far as I know all concerns in that particular business at that time.

The CHAIRMAN. Now, when did Carolina Vend-A-Matic first receive a contract from Deering Milliken Corp.?

Judge HAYNSWORTH. Senator, I believe the first one was in Gayley Mill in 1952. They did have coffee machines in the Judson Mill prior to 1958, but I am not certain what date, what year they went into Judson Mill, but they were removed in 1958.

The CHAIRMAN. How many mills does Deering Milliken have, or did they have in 1963?

Judge HAYNSWORTH. Senator, again, I don't know. In the case in my court I believe it is mentioned they had something like 27 mills, but I am not certain of the number.

The CHAIRMAN. Well, isn't it correct that they had in excess of 27 mills when you count the mills where they sold their goods and financed them, and, in fact, controlled them?

Judge HAYNSWORTH. I think so, sir, but I am—I don't know enough about it to say just the exact number that they did have. But my impression was it was 27 or more.

The CHAIRMAN. Yes. Now, those 27 mills had 19,000 employees, did they not?

Judge HAYNSWORTH. So, it appears; yes, sir.

The CHAIRMAN. All right. Now, when did Carolina Vend-A-Matic get its second contract with Deering Milliken?

Judge HAYNSWORTH. The second one would have Judson Mills if it was not the first. They had machines there which were removed in 1958.

The CHAIRMAN. You don't remember what year?

Judge HAYNSWORTH. I don't know what year they went into Judson Mills. I do know they were removed in 1958.

The CHAIRMAN. It was before 1957?

Judge HAYNSWORTH. Yes, sir.

The CHAIRMAN. Now, you were appointed U.S. circuit judge in 1957, is that correct?

Judge HAYNSWORTH. That is correct, sir.

The CHAIRMAN. And at that time Carolina Vend-A-Matic—and by the way, you owned a one-seventh interest in Carolina Vend-A-Matic?

Judge HAYNSWORTH. Yes, if no regard is had to one share, but approximately one-seventh; yes, sir.

The CHAIRMAN. You had machines in two of their 27 mills?

Judge HAYNSWORTH. That is correct.

The CHAIRMAN. And the next year after you became judge, the company, Deering Milliken, had Carolina Vend-A-Matic remove the machines from one of the mills?

Judge HAYNSWORTH. Yes, sir. And in that same year more machines were installed in the Gayley Mill to dispense foods as well as coffee, in 1958, and I believe it was the same year they put one coffee machine and one candy machine in a very small little plant in Jonesville.

The CHAIRMAN. Now, when was the case of Darlington Manufacturing Co. versus National Labor Relations Board argued?

Judge HAYNSWORTH. It was argued in June 1963.

The CHAIRMAN. When was it decided?

Judge HAYNSWORTH. November, 1963.

The CHAIRMAN. When did Carolina Vend-A-Matic receive its next contract from Deering Milliken?

Judge HAYNSWORTH. It received one in the summer of 1963. As I recall, this began in late spring, the contract was made in the summer of 1963, in a brand new plant being built, Magnolia, and they received eight bids from eight companies in this line of business and on their appraisal of those bids they made an award to Vend-A-Matic.

The CHAIRMAN. How many more—at what other times did you bid in 1963 to place machines with Deering Milliken plants?

Judge HAYNSWORTH. They did place bids for two more plants, Laurens Mill and Drayton Mill. Again, others put in bids, too, and they lost both of those. They got neither.

The CHAIRMAN. In other words, from 1963 Carolina Vend-A-Matic received one plant of Deering Milliken and lost two?

Judge HAYNSWORTH. That is correct, sir.

The CHAIRMAN. Now, how did Deering Milliken let its bids?

Judge HAYNSWORTH. Senator, at the time I knew very little about that, both someone would put an invitation for bids to a number of concerns in the area and each of them would put in a proposal, and how they were appraised, I don't know the particulars, but they looked at the services they offered and the commissions that would be payable and a number of things like that to appraise the bids and their services and equipment.

The CHAIRMAN. Now, Carolina Vend-A-Matic was requested to submit a bid in December, 1963, after the decision of the Fourth Circuit in the Darlington case, is that correct?

Judge HAYNSWORTH. Yes, sir; Drayton Mills.

The CHAIRMAN. Now, you lost that?

Judge HAYNSWORTH. Yes, sir.

The CHAIRMAN. Deering Milliken gave it to someone else?

Judge HAYNSWORTH. Yes, sir.

The CHAIRMAN. As I understand, of 19,000 employees you did vending business with approximately 700 or slightly less than 700 employees?

Judge HAYNSWORTH. I believe that is correct, sir.

The CHAIRMAN. Yes.

Now, what was the nature of your association with Carolina Vend-A-Matic? You owned roughly a seventh of the stock?

Judge HAYNSWORTH. Well, that was the principal thing, sir. From the outset all the stockholders were directors, and I remaind a director until 1963. I may explain here when I went on the court in 1957 I was a director of a number of concerns. Most of them published financial statements including a list of directors and it was very widespread. I felt that a judge in my position should not remain a director of such a concern out of fear of the fact that somebody might attempt to influence what I did as a judge by trying to throw business or favors to a concern of which I was a director, so I resigned from those. I did not resign as a director from two small concerns. One of them, Main Oak, which is a passive concern in which I own a small amount of stock and which owns two pieces of real estate under long-term lease. It has no active business at all. I retained on this board of directors because, again, it was very closely held. I had no reason to think that my interest as a stockholder or as a director was known outside this small group, and I felt no compulsion at that time to resign.

However, in October 1963, the Judicial Conference of the United States moved by the fact that some judges elsewhere had remained on boards of banks and institutions of that sort, adopted a resolution in which they expressed the sense that no judge should serve as an officer or director of any concern conducted for profit. This was not a mandatory thing but in light of the way that the Judicial Conference had expressed itself, I promptly resigned from the board of those two concerns. This was in October 1963.

The CHAIRMAN. Now, what was your connection with the operation of Carolina Vend-A-Matic? That was the question.

Judge HAYNSWORTH. Senator——

The CHAIRMAN. Did you have anything to do with the preparing of bids or soliciting business for Carolina Vend-A-Matic?

Judge HAYNSWORTH. Nothing whatever.

The CHAIRMAN. Yes, sir. Then what was the nature of your——

Judge HAYNSWORTH. The only real service I rendered to them was in connection with financing, bank loans particularly in the years prior to 1957. In addition to that, I would attend directors meetings, from time to time—when I was there and I could—in which various things would be discussed. But my principal concern was with finance.

The CHAIRMAN. Did you have any stock or any interest in Deering Milliken?

Judge HAYNSWORTH. No, sir.

The CHAIRMAN. Carolina Vend-A-Matic did business, a vending business, in three of its plants, for about 700, less than 700, out of 19,000 employees?

Judge HAYNSWORTH. Yes, sir.

The CHAIRMAN. About what did that business total a year?

Judge HAYNSWORTH. Well, the estimates are on a full year basis—a gross of about $100,000, gross receipts in these machines.

The CHAIRMAN. Out of how much? How much business did Carolina Vend-A-Matic do?

Judge HAYNSWORTH. In 1963 its total gross was $3,100,000.

The CHAIRMAN. Yes, sir. Then about what percent of its gross business did it do with Deering Milliken?

Judge HAYNSWORTH. Roughly 3 percent.

The CHAIRMAN. Roughly 3 percent? I think a judge has got to be in a position that he doesn't care who wins a case. I think that ought to be the test. Now did Deering Milliken throw you any business at any time?

Judge HAYNSWORTH. No, sir; they did not. And I think the record speaks for itself. They did not favor this concern in any way.

The CHAIRMAN. What interest did you have in the outcome of the *Darlington* case?

Judge HAYNSWORTH. Well, the only interest I had was that as a judge, sir, to see that the result was what I thought the correct one in law. As far as any financial interest is concerned, of course I had none, and the only way that I have been thought to have had any was if Deering Milliken knew of my financial interest and knowing of it sought to influence me by some special favor of the Carolina Vend-A-Matic. In the first place, the record shows they did not know. In the second place the record shows that they did it no favors.

The CHAIRMAN. In fact, one man who let the contract said he had never heard of you, is that correct?

Judge HAYNSWORTH. That he said, and that doesn't surprise me, sir.

The CHAIRMAN. Yes, sir.

Judge HAYNSWORTH. But it was, the reason I moved to sell my stock as soon as I could, once it became known of my stock interest I thought I should divest myself of that, and I moved to do that as quickly as I could.

The CHAIRMAN. Now, your stock in Carolina Vend-A-Matic, that was organized as just a paper corporation with nothing and you put up around $3,000 altogether, is that correct?

Judge HAYNSWORTH. I did and the remaining four, of course, too. But we started out with very little money.

The CHAIRMAN. Yes. Now, you said you arranged bank financing. But how much of the obligations which were personally endorsed by you and the other stockholders amount to at different times? I know that it varied.

Judge HAYNSWORTH. Senator, when two of them got concerned about their exposure to financial loss, as I recall endorsed bank loans had gotten in excess of something like $50,000. They were increased after that. They kept on growing, and in 1963, the total bank loans amounted to several hundreds of thousands, but not all of those were endorsed by that time.

The CHAIRMAN. You say bank loans of several hundred thousand?

Judge HAYNSWORTH. Yes, but by 1963, they were not all endorsed. We were getting so that it could stand on its own credit and had some credit on its own.

The CHAIRMAN. About how many vending machines, about how many plants did Carolina Venda-A-Matic have machines in?

Judge HAYNSWORTH. In the record is a copy of the proposal they made to Drayton Mills in December 1963. In that is a list of 46, I believe, industrial plants in which it provided full vending service.

The CHAIRMAN. Forty-six.

Judge HAYNSWORTH. Forty-six.

The CHAIRMAN. And you had only three in Deering Milliken of its 27 and one of them was a plant that had about 50 employees, is that——

Judge HAYNSWORTH. Yes. Of course, it is not in this list of 46 because that was not a full vending service. So there are only two plants in the list of 46.

The CHAIRMAN. Senator McClellan.

Senator MCCLELLAN. Thank you, Mr. Chairman.

I have taken occasion to review some, some 12 to 15, of the important court decisions in which you participated. Later I may want to ask you some few questions about one or two of those decisions. But because the other issue has been brought to the front, been focused on here this morning, I will interrogate you about it, the conflict of interest question that has been raised.

Judge HAYNSWORTH. Yes.

Senator MCCLELLAN. But in examining these decisions I cannot say that I agree with every ruling that you made. And I don't think I have been able to detect that they show a trend of a philosophy that is biased or prejudiced in any direction with respect to civil rights cases or labor cases. However, others might disagree. But I have read them with a view of determining whether there was apparently a fixed or ingrained philosophy that you entertained that might cause you to be biased or prejudiced in cases of any kind. I do not at the moment find it, although I might not agree with all of your decisions and later may wish to ask you some questions about them.

Now, with respect to this conflict of interest, and I will try to be brief because there are other colleagues here who would like to ask some questions before we have to recess at 12 o'clock—and I just want to be very brief in deference to them so they can have an opportunity—let me ask you about this Carolina Venda-A-Matic company. Did it ever have a case in your court?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. Never at any time did it have litigation——

Judge HAYNSWORTH. None that I know of, no.

Senator MCCLELLAN (continuing). That came before you?

Judge HAYNSWORTH. Oh, no. No, sir.

Senator MCCLELLAN. And at the time that you went on the court this was still a small company, closely held company between you and your former law associates, partners and one or two business friends, am I correct?

Judge HAYNSWORTH. That is correct, sir.

Senator MCCLELLAN. At that time, could you anticipate or foresee any probability of this company having litigation in your court?

Judge HAYNSWORTH. None whatever.

Senator MCCLELLAN. And in fact it has never had?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. Now, with respect to this Darlington—is that the name of it?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. *Darlington Mills* v. *NLRB*——

Judge HAYNSWORTH. Yes.

Senator MCCLELLAN (continuing). How many times was that case before your court in one form or another?

Judge HAYNSWORTH. Three times.

Senator MCCLELLAN. Now, if I am correct—if I am not, you correct me, I am sure others will—on the issues that came before you in the

three times that case was before your court is it correct to say that in two of those instances your ruling was apparently favorable or was favorable to the labor side of the issue rather than to the management side?

Judge HAYNSWORTH. Well, in the first one, the Board had remanded the case for rehearings two or three times.

Senator MCCLELLAN. Yes.

Judge HAYNSWORTH. And an injunction was sought to prevent one more remand. And in that case, we held the Board could remand it to get specific information which it said it required. To that extent agreed with the Board and the Union.

Senator MCCLELLAN. Well, that was on labor side of the issue.

Judge HAYNSWORTH. But we did say that there should not be a broad, that there will have been enough hearings so that there should not be a broad remand beyond a search for the specific information which the Board said it would like.

Senator MCCLELLAN. You restricted somewhat——

Judge HAYNSWORTH. Yes.

Senator MCCLELLAN (continuing). The scope of the further considerations?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. But at least there was a reversal of the lower court?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. All right. Now, the next one, proceed with it.

Judge HAYNSWORTH. Well, the next one of course was the one there is all this talk about now in which we refused to enforce the Board's order which found that an unfair labor practice had been worked on the basis of coercion of the employees of that mill that was closed down.

Senator MCCLELLAN. Now, you reversed it and sent it back for further proceedings, is that right?

Judge HAYNSWORTH. No, we refused enforcement at that time, sir.

Senator MCCLELLAN. All right.

Judge HAYNSWORTH. And this was when an appeal went to the U.S. Supreme Court. And I may say here much has been said in the press that my position at the time was wrong. And of course if I did anything wrong in sitting, the fact the result was right would not make my sitting right as Martin Mankin thought when he sought to defend himself on the ground that the results were correct in law. But I think from the point of view of the implication it might be worth a note that the Supreme Court held that on the record we had before us we were correct, we should not have enforced the order.

Senator MCCLELLAN. Should not have what?

Judge HAYNSWORTH. We should not have enforced the order, just exactly what the court did.

Senator MCCLELLAN. Yes.

Judge HAYNSWORTH. But the Supreme Court said there was a theory on which enforcement might, the same result might be reached, if in fact the purpose of the closing of that mill was to coerce employees elsewhere and it had that effect, then an unfair labor practice would have been made out. But it said the Board did not inquire into this, and

they had not, there are no findings in the record which will support a conclusion that the closing had that purpose and that effect. So there was a remand to the Board for another factual inquiry to see if there was a basis upon which the same result could be reached.

But the Supreme Court agreed with us that on the record we had and on the contentions that were made in my court we were correct in declining enforcement of the Board's order.

I simply mention that because it has been widely suggested in the press because the Supreme Court did remand it that that proved that I was wrong when I concurred in Judge Bryan's opinion in the first place. And I suggest the Supreme Court agreed with us.

Senator McCLELLAN. All right. Did the matter come before you a third time on an issue of an injunction?

Judge HAYNSWORTH. It did. It went to the Board and the Board thereupon found on the basis of the opinion written by the Supreme Court that the closing was influenced by a purpose to coerce employees in remaining plants and that it had that effect, and so they again found an unfair labor practice. And the case again came before my court and I joined with, not the whole court because there were two dissents but I was with the ones who held that the order itself should be enforced.

Senator McCLELLAN. And as a result of that was the injunction dissolved? There was an injunction that had been issued, had there not?

Judge HAYNSWORTH. Well, that had gone by earlier when the remand was held, and pursuant to the order we entered there were hearings and that order served its purpose and was, and was completely out when the——

Senator McCLELLAN. I see. Let me ask you; did the Carolina Vend-A-Matic Co. have any interest whatsoever in that litigation?

Judge HAYNSWORTH. No, sir.

Senator McCLELLAN. Did an order, could an order, any order that was made in any of these cases affect it either directly or indirectly in anyway whatsoever?

Judge HAYNSWORTH. It did not

Senator McCLELLAN. Did you profit personally by reason of the stock you held in Carolina Vend-A-Matic? Did you profit in any sense, in any degree whatsoever by reason of any decision or court action that was, came before your court——

Judge HAYNSWORTH. I did not.

Senator McCLELLAN (continuing). With respect to Deering Milliken—is that right—and Darlington Mills?

Judge HAYNSWORTH. I did not.

Senator McCLELLAN. I notice in the questions in response to Senator Eastland you said that your company had machines, vending machines in plants serving 700 employees of the Deering Milliken Co.; is that right?

Judge HAYNSWORTH. Yes.

Senator McCLELLAN. And it has many subsidiaries?

Judge HAYNSWORTH. Yes, sir.

Senator McCLELLAN. Out of a total employment of 19,000?

Judge HAYNSWORTH. That is correct, sir.

Senator McCLELLAN. And if a question about substantialness here would arise as to whether 700 is a substantial amount of 19,000, if you put it on the basis of employees being served, assuming that there is some conflict of interest—it could not be if there were not—if you assumed there were it would be in that relationship of 700 to 19,000, is that correct?

Judge HAYNSWORTH. That is correct.

Senator McCLELLAN. And on the basis of money involved from that 700, I believe you said there was a gross amount of income of about $100,000?

Judge HAYNSWORTH. Yes, sir.

Senator McCLELLAN. What would be the gross profit out of that $100,000? That is the gross income. Now what would be the profit, net profit out of that?

Judge HAYNSWORTH. Senator, I don't know. The commission would have been payable to approximately——

Senator McCLELLAN. Sir?

Judge HAYNSWORTH. Commissions would have been payable of approximately 10 percent, I believe, and the remaining 90 percent, what the gross would be vary so much with the numbers of machines you had to put in a particular place.

Senator McCLELLAN. I figure you make about a 10-percent profit.

Judge HAYNSWOTRH. Oh, no, I don't think so, not on these, particularly in the last one. They had 16 machines serving 350 people.

Senator McCLELLAN. Well, let us see. I am trying to find out of this $100,000 that was gross that came from that source to your company in which you had stock, how much of that would be transmitted into net profit at the end of the year for your company?

Judge HAYNSWORTH. Senator, I can only guess at that because I really——

Senator McCLELLAN. Well, there is some way of determining it. What was your overall profit? And then you divide this by the amount of total income. There is a way of arriving at it.

Judge HAYNSWORTH. Overall I expect it was close to approximately 10 percent, but I don't know. I have not tried to compute it.

Senator McCLELLAN. Well, I think you ought to compute that and let the record show at this point what out of that $100,000—the only thing that could possibly be in controversy here would be that $100,000. That is all you got out of the machines, your company got out of the machines that were in the Deering Millikin plants or its subsidiaries, is that correct?

Judge HAYNSWORTH. Yes sir.

Senator McCLELLAN. And what would be your share of the net profits, what stock, related to the amount of stock that you owned. Now, what would be your share of the net profits?

Judge HAYNSWORTH. One-seventh of whatever they were.

Senator McCLELLAN. Your share would be one-seventh of the net after all operating expenses?

Judge HAYNSWORTH. Yes, sir.

Senator McCLELLAN. In other words, if they declared a dividend on the profits, yours would be one-seventh of that?

The CHAIRMAN. Did you rebate Deering Milliken anything?

Judge HAYNSWORTH. They were paid a commission on Magnolia and Gayley, and the small installation in Jonesville. I doubt if they were, but I don't know, sir.

Senator MCCLELLAN. Now, then, your total gross income I believe you said was $3 million, from all of the company's operations, was $3 million?

Judge HAYNSWORTH. $100,000. The statement is in the record, sir.

Senator MCCLELLAN. All right. I am just analyzing the situation here.

Judge HAYNSWORTH. Sure.

Senator MCCLELLAN. Let's see how great a conflict of interest you might have had here, if it were substantial or not, if any at all?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. Now, your company did not have any litigation——

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN (continuing). So it couldn't have had any interest. So if there was conflict at all, it was from an indirect source, is that right?

Judge HAYNSWORTH. Yes, sir. I don't think it was there either but——

Senator MCCLELLAN. Well, I understand, but there cannot be any charge, there isn't any charge here that you decided a case for your company?

Judge HAYNSWORTH. That is correct.

Senator MCCLELLAN. All right. It is through some indirect application of economic factors that, if any at all, you would have to be charged with conflict of interest. And now the question is, I am trying to ascertain whether if at the worst, assuming it is true, whether it is substantial and, if so, how substantial. So we have it down to where you would have actually one-seventh of whatever the net profit is out of $100,000 gross——

Judge HAYNSWORTH. That is correct.

Senator MCCLELLAN (continuing). Am I correct?

Judge HAYNSWORTH. That is correct.

Senator MCCLELLAN. And I think you or your company or somebody, your auditors ought to be able to figure this out and we ought to have that for the record. Now, that is the most—from what we have heard here so far and from what I understand is involved here—that is the most that you could have at all profited from this whole thing.

Well, you can calculate it later and submit it for the record.

Is there any other instances—do you know of any other charges or accusation since your appointment which have come up whereby you are charged with any conflict of interest in your services as a judge?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. You know of no other?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. This is all I have heard of.

Well, I will yield. I have another thought, but I will yield for the present so the others may have an opportunity. But I want to interrogate you further, and I would like for you to make this calculation

and put it in the record here of what the worst is if there is any truth or relationship or validity in this charge at all.

Judge HAYNSWORTH. Yes, sir.

The CHAIRMAN. Now, gentlemen, we are going to recess at 12 o'clock and come back at 2:30.

Senator ERVIN. Judge, so far as I can recall I have never had any personal acquaintance with you. However, I happen to have practiced law in the fourth circuit and it was necessary for me to keep abreast of the decisions of the Fourth Circuit Court of Appeals. After I ceased to practice law and came to the Senate my legal curiosity prompted me to continue that practice. And so over the years I have been familiar with the decisions of the U.S. Court of Appeals for the Fourth Circuit and have read your opinions in the cases it has decided. I am compelled to say that as a lawyer, I have reached the honest and abiding conviction from reading your opinions that you have discharged your duties as a member of the U.S. Court of Appeals for the Fourth Circuit with what Edmund Burke called "the cold neutrality of the impartial judge." I know of no higher tribute that can be paid to any occupant of a judicial office.

Judge HAYNSWORTH. Thank you very much, sir.

Senator ERVIN. I would like to make one thing plain. That is, the way in which factual decisions are made in the courts and the way in which factual decisions are made by the National Labor Relations Board are based upon different legal principles; are they not?

Judge HAYNSWORTH. Yes. The fact as found by the Board the court must accept if there is support in the record for them.

Senator ERVIN. In others words, courts in making factual decisions are required by law to base those decisions on what we lawyers ordinarily call the greater weight of the evidence?

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. However, the National Labor Relations Board is the sole judge of the evidence and any decision which it makes on a question of fact cannot be reviewed by the courts except upon the allegation that it is not supported by substantial evidence?

Judge HAYNSWORTH. That is correct, sir.

Senator ERVIN. Often I, as a lawyer, have wondered what is substantial evidence—whether it is 5 or 10 percent or what of the evidence. But whatever it may be, if it be, say, 5 percent and the National Labor Relations Board basis a finding of fact on that 5 percent of the evidence and the finding of fact is inconsistent with 95 percent of the evidence, the courts are bound by it; are they not?

Judge HAYNSWORTH. They are.

Senator ERVIN. So when the court approves the finding of the NLRB, it doesn't necessarily do so on the basis that it is the proper finding on the evidence but because the court is bound by the statute giving the National Labor Relations Board the power to find the facts?

Judge HAYNSWORTH. Well, we would accept the findings of the Board whether we think we would have found the facts the same way or not.

Senator ERVIN. Yes. In other words, courts in many cases do actually support and uphold and implement the findings of the National Labor Relations Board notwithstanding the fact that the court itself believes

those facts as found by the National Labor Relations Board were erroneously found?

Judge HAYNSWORTH. Oh, yes.

Senator ERVIN. Now, first, the mill which gives its name to the *Darlington* case was a mill which had been erected in Darlington, S.C., by the residents of that town back in 1888, as I recall. That was during the first year of the first administration of Grover Cleveland as President.

Is it not true that there was a very serious question of fact and law in the *Darlington* case concerning whether Darlington was a separate and legal entity from the Deering Milliken chain or whether they were in fact and in law the same single employer?

Judge HAYNSWORTH. Yes; this was one of the points as to whether or not the order could reach Milliken itself.

Senator ERVIN. In other words, there were two fundamental questions in that case. The first was whether Darlington, viewed as a separate legal entity wholly apart from the Deering Milliken Co., had a right to go completely and permanently out of business notwithstanding the advent of the union on the scene?

Judge HAYNSWORTH. Yes.

Senator ERVIN. And the other point was whether or not Darlington constituted an integral part of the Deering Milliken chain and whether or not the fact that Darlington went out of business would be considered a partial closing as distinguished from a complete closing of one of the integral parts of that chain?

Judge HAYNSWORTH. This was true, though in the context in which it came up to the court the first time the claim was that the closing was coercive of the employees in that one plant. And the Supreme Court agreed. Whether it was a part of the larger chain or not, if that were the reason, there was no unfair labor practice. But if the purpose was and the effect was to coerce the employees in other plants, then an unfair labor pracitce would have been committed.

Senator ERVIN. I know that to be true because I argued the *Darlington* case before the Supreme Court of the United States on one point and one point only. That is, I took the position that Darlington as a separate legal entity had an absolute right to go out of business permanently and completely regardless of whether its action in so doing was motivated by union animosity or any other factor. The Supreme Court held that to be sound law and to that extent affirmed the holding of the court of appeals in the 1963 case.

Judge HAYNSWORTH. Indeed, yes, and it said on the record we had there was no warrant to conclude anything else.

Senator ERVIN. This whole matter of the *Darlington* case arose in 1956 as a result of various economic factors and as a result of a union election in which the employees of that plant voted for the union 258 to 252, which was a six-vote margin.

Now, then, the matter pended before the National Labor Relations Board from 1956, and it first came before the court of appeals not as a matter under the National Labor Relations Board, but on an injunction proceeding——

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN (continuing). In 1961, which was 5 years later. At that time you wrote a unanimous opinion for the court of appeals, and

the question involved there was whether or not the National Labor Relations Board had performed its legal duty to make a decision in the case within a reasonable period of time.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. Now, Darlington and Deering Milliken had gone into the U.S. Circuit Court for the Middle District of North Carolina and had sued Reed Johnston, the regional director of the National Labor Relations Board from North Carolina, to enjoin him from carrying out an order of the National Labor Relations Board remanding the case to the trial examiner, Lloyd Bucannon, for the taking of further evidence. And they alleged in that case that the National Labor Relations Board, by permitting this matter to drag from 1956 to 1961, or thereabouts, had failed to perform its statutory duty to decide the matter with reasonable dispatch.

Now, in that case the union wanted this proceeding held, and you wrote the opinion in which you indicated a very strong case for the fact that they had not moved with reasonable dispatch. However you held, or rather the circuit court held in your opinion, that the union was entitled to have the matter reheard to a limited extent by the trial examiner. Actually, the decision limited the hearing as to certain matters which had arisen in connection with the merger of Deering Milliken with Cotwool Manufacturing Co.

Judge HAYNSWORTH. Yes. The district court had granted a broad injunction which would have foreclosed all hearings. We disagreed with that and said that the Board and the union were entitled to further hearings to produce the specific information it said it was lacking and that they needed.

Senator ERVIN. So the decision you wrote on that occasion for the unanimous court of appeals was at least a partial victory for the unions and a partial defeat for the textile plants?

Judge HAYNSWORTH. Well, yes. The unions got the right to present the additional information that they said they required or wanted.

Senator ERVIN. Now, this hearing was had and later the National Labor Relations Board made a decision. The Board concluded two things in summary. The first was that the Darlington mill and the Deering Milliken chain were a single employer within the meaning of the National Labor Relations Act. Additionally, they said even if Darlington were a separate entity, that Darlington committed an unfair labor practice under the Labor Management Act by going out of business completely and permanently because it was motivated to some degree by the advent of the union.

So the question then came up before the court of appeals and there was a divided decision, 3 to 2 written by Judge Bryan and being concurred in by Judge Boreman and by you, and a minority opinion being written by Judge Bell and being concurred in by Judge Sobeloff.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. And the court of appeals held in that case that, in effect, it was not necessary to pass upon the question whether Darlington and Deering Milliken were a single employer because Deering Milliken had a right to close that one mill completely and permanently, although it continued the operation of other mills?

Judge HAYNSWORTH. Yes, sir. I think that is correct.

The CHAIRMAN. Let us have order.

Senator ERVIN. In other words, to get it right down, Judge Bryan said:

> To go out of business in toto or to discontinue it in part permanently at any time, we think was Darlington's absolute prerogative. The fundamental purpose of the National Labor Relations Act is to preserve and to protect the rights of both industry and labor so long as they are in the relationship of employer and employee. But the statutes' scope does not exceed that providence. It does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. It may withdraw from that status with immunity, so long as the obligations of any employment contract have been met.

Now, that case went to the Supreme Court and the Supreme Court didn't reverse anything. They remanded the case. However, they sustained a point I argued totally, that viewing Darlington as a separate corporation, or separate legal entity, it had a right to go out of business entirely and completely for any reason including antiunion motives. They said, however, that the law would be otherwise if Darlington was a part of the Milliken chain, and the Milliken chain closed down Darlington for the purpose of chilling unionism in the other plants of the Milliken chain.

Judge HAYNSWORTH. And it had that effect.

Senator ERVIN. Yes, they said it had to have that purpose and they had to reasonably see that would be the effect of it. So they remanded the case to the U.S. Court of Appeals for the Fourth Circuit with directions that the National Labor Relations Board should pass upon the question of purpose and effect and suggested that after that was done the U.S. Court of Appeals for the Fourth Circuit would be able to pass upon the entire case and determine whether or not there was any substantial evidence to sustain the finding of the National Labor Relations Board with respect to the employer relationship of Darlington and Deering Milliken.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. Then the National Labor Relations Board conducted further hearings and they found that the purpose and effect required by the Supreme Court decision did exist and they rendered their decision. And the question came before the U.S. court of appeals as to whether it would be enforced. And the court of appeals sat en banc—that was in 1967, I believe.

Judge HAYNSWORTH. I think that is correct, sir.

Senator ERVIN. Before I get to that, though, the decisions of the National Labor Relations Board were in substance different from those of the trial examiner on the facts and the original decisions of the National Labor Relations Board was dissented from by members of the Board, Leedum and Rodgers, were they not?

Judge HAYNSWORTH. The Board itself was split on this almost from the very outset; yes, sir.

Senator ERVIN. Now, when the case came before the court of appeals in 1967. it was decided May 31, 1968, and the opinion was written by Judge Butsner and his opinion was concurred in by Judge Sobeloff, Winter, and Craven. Judge Bryan and Boreman dissented.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. And you wrote an opinion which concurred in part and dissented in part, as I construe it.

Judge HAYNSWORTH. No; I simply concurred——

Senator ERVIN. Well, you concurred but you did not fully approve of the majority opinion in one limited respect. Now, the question there which the court decided in favor of the unions was whether there was substantial evidence to support the finding of the National Labor Relations Board that Darlington was an integral part of the Milliken Deering chain and that the Deering Milliken chain had closed Darlington with the purpose and the effect that the Supreme Court had said was necessary to sustain an unfair labor practice.

Judge HAYNSWORTH. The Board so found, and I fully concurred in that. And if this contention had been before the court in 1963, there would have been no doubt about the result in my court then. We would have enforced the order.

Senator ERVIN. Yes. Well, to go back to the 1963 opinion, was the not overwhelming weight of the decisions of the U.S. courts of appeal throughout the Nation in conformity with the opinion that Judge Bryan wrote at that time?

Judge HAYNSWORTH. I think it was, and I think the Supreme Court said it approved, too.

Senator ERVIN. Yes. And the National Labor Relations Board conceded that there was not a single precedent to support its finding viewing Darlington as a separate plant with no right to go out of business completely and purposely for union bias.

Now, as a matter of fact, your concurring opinion in the 1967 case was on the side of the union, was it not?

Judge HAYNSWORTH. Oh, yes; I completely accepted the findings of the Board and on that basis ordered that——

Senator ERVIN. Now, you expressed some misgivings about the result of the opinion on the minority Darlington stockholders?

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. And I shared that misgiving.

Judge HAYNSWORTH. Yes, sir, because I thought that if the purpose was to gain some advantage for the single unit employer someplace else, the economic burden should follow them and not fall on the independent stockholders who had nothing to with that at all.

Senator ERVIN. In other words, the control of these companies was in the hands of what we call Deering Milliken and the decision in which you concurred was to the effect that they closed Darlington for the purpose of chilling unionism within the purview of the U.S. Supreme Court decision in their other plants?

Judge HAYNSWORTH. And the burden should fall to them and not on Darlington; yes, sir.

Senator ERVIN. Now, at that time, Darlington had 200 stockholders who had no interest whatever in any of the mills of the Deering Milliken chain. And the National Labor Relations Board itself conceded that there was a substantial interest to liquidate the mill and go out of business.

The mill had been in bankruptcy at one time and been reorganized in 1937. It had run for years at a very low rate of return and it was losing $40,000, according to Judge Bryan's opinion, in the year in which it was liquidated and it stood to lose $240,000 in the next year as near as could be projected. They undertook the reorganization of their business by installing new machinery, and were in the process of

carrying it out when the union appeared upon the scene and said if they were to choose the union that the mill could not carry out the various steps which an impartial engineering efficiency firm said were necesary to enable it to remain a viable economic entity. And so these 200 stockholders joined Milliken in voting to liquidate the mill. I think a very plausible case could be made for the proposition that since they had no interest in chilling unionism at any of the other mills that they ought not to have borne a part of the consequences of the unfair labor parctice of those who were controlling the mill. And you expressed some misgivings on that point also.

Judge HAYNSWORTH. Yes, sir. I wrote to state them. I thought the burden of the award should fall on the larger group and not on these independent stockholders who had no part in the purpose which the Supreme Court said was necessary to support the finding of an unfair labor practice.

Senator ERVIN. As a matter of fact, your concurring opinion that the entire burden resulting from the unfair labor practices found by the National Labor Relations Board should fall on Deering Milliken and no part of it should fall upon the independent minority stockholders of Darlington indicates that you have a fine sense of justice and was eminently correct.

Judge HAYNSWORTH. Thank you, sir.

Senator ERVIN. To my mind the results of the majority opinion is that they were going to confiscate the remaining interests of the independent 200 stockholders in the Darlington plant who had nothing to do with the Deering Milliken chain to help pay for the consequences of the established unfair labor practice.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. Mr. Chairman, I would like to put in the record at this point the entire opinion of the court of appeals in the *Darlington* case.

The CHAIRMAN. It will be admitted.

(The opinion appears in the appendix.)

The CHAIRMAN. We will recess now until 2:30.

(Whereupon, at 12:15 the commitee recessed, to reconvene at 2:30.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

TESTIMONY OF HON. CLEMENT F. HAYNSWORTH, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES—Resumed

Senator ERVIN. Judge, there have been some writeups in the press indicating that the law involved in the *Darlington* case was only law relating to the textile industry. I will ask you if the law involved in the *Darlington* case did not have a direct relevance to every business conducted by an individual or by a private corporation or by a partnership which employed the services of other people and which affected to any degree interstate commerce.

Judge HAYNSWORTH. Oh, yes, sir. There is no special rule for textile concerns.

Senator ERVIN. In other words, the law involved in this case was law which is applicable to every business having the necessary relationship to interstate commerce in the entire United States?

Judge HAYNSWORTH. Oh, yes, sir.

Senator ERVIN. And I assert without fear of successful contradiction from any source that the opinion which Judge Bryan wrote in the 1963 case was in full accord with the overwhelming weight of authority in all of the circuit courts in the United States which had occasion to pass upon that question at that time.

For example, the case of *Jays Foods* v. *National Labor Relations Board* (292 Fed 2d at page 317), decided July 25, 1961, said this on page 320:

"Any employer"—

and this case involved a question where an employer had gone partly out of business as a result of the advent of a union—

Any employer has a right to consider objectively and independently the economic impact of unionization of his shop and to manage his business accordingly. Fundamentally, if he makes a change in operation because of reasonably anticipated increased costs, regardless of whether they are caused by or contributed to by the advent of a union or by some other factor, his action does not constitute discrimination within the provisions of Sections 8(a) (1), (2), (3) and (5)—(1), (3) and (5) of the act.

I intend to put in the record later a number of similar decisions of circuit courts.

Now, when the case first came before the Circuit Court of Appeals for the Fourth Circuit, it came upon a ruling of the National Labor Relations Board substantially to this effect, that no matter how prime the economic circumstances confronting a businessman or a private corporation engaged in a business affecting interstate commerce may have been, the National Management Act denies to that businessman the right to go out of business permanently and completely if his decision to do so is motivated in any degree by the prospect of increased costs arising out of the advent of a union.

Was that not substantially the question that confronted the circuit court in the 1963 decision?

Judge HAYNSWORTH. I think so, sir. I think a majority of the Board may have gone a little beyond if a motive for penalizing them for entering a union entered it——

Senator ERVIN. And I don't ask you to comment on this but I make this assertion on my own behalf, that if that decision of the National Labor Relations Board had stood, every man that went into business in the United States, that is, a business affecting interstate commerce, would have had to stay in business until the last drop of economic blood was squeezed from him, if the advent of a union contributed to the economic impossibility of his remaining in business.

I don't ask for any comment on that, but that is what I assert from that decision. I assert that you were all confronted with one of the most fundamental questions of freedom ever presented to any court in the United States. The Supreme Court of the United States, in part certainly, agreed with the decision that the majority of the Court made, because it held that when an employer loses his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.

In other words, they said, the closing of an entire business, even though discriminatory, ends the employer-employee relationship. The force of such a closing is entirely spent as to that business when termination of the enterprise takes place.

I maintain that that was a correct interpretation of the National Labor Relations Act because it shows entirely that it was only intended to regulate the relationship between an employer and his employees as long as he was engaged in a business affecting interstate commerce.

If the Congress had undertaken to enact into law what the National Labor Relations Board declared in its first decision, that a man could not go out of business completely and permanently, no matter what his economic conditions were, if he was induced to do so partly by reason of the advent of a union, it would have violated the Constitution clearly. This is true because Congress can only regulate a man's action in respect to interstate commerce, while his action affects interstate commerce.

It would not only have done that, but it would have violated due process of the fifth amendment, because it would have constituted the taking of one man's property for the benefit of others.

And so I think the decision was correct, and that was what you were confronted with the first time, in substance.

So taking these cases it is charged by insinuation that you had some kind of a bias toward Deering Milliken's interests. I am going to have to say in plain North Carolina language, leaving aside all legal language, that if you did, you sure took a poor way to show it, because when the first case came before the Court of Appeals you wrote the opinion and you reversed, or modified, the decision of the U.S. District Court for the Middle District of North Carolina in a way which was highly favorable to the ultimate success of the unions, because your ruling allowed them to present evidence before the National Labor Relations Board. This was of rather crucial importance with respect to the point upon which the case was finally decided in favor of the union, that is, a question of the control of Deering Milliken over these over textile plants.

The second time the case came up you had agreed with the opinion of a man who in my book is one of the fairest and most able jurists of my generation. I refer to Judge Albert Bryan. You agreed to an opinion which was in harmony with the overwhelming weight of authority of all the Circuit Courts of Appeal in the United States which had passed on this subject.

And when you came to the final case after the Supreme Court had sent it back and after the facts had changed, the picture of the issues had changed, you agreed to a judgment that was substantially evidenced to support the findings of the National Labor Relations Board with respect to the single employee relationship and with respect to the purpose and intent which actuated the closing of the Darlington Mill. And you went far beyond any other judge in the case in saying that the entire burden of responsibility for the unfair labor practice established by the decision of the National Labor Relations Board should be placed upon Deering Milliken and none of it upon the minority stockholders of the Darlington Corp.

So I repeat, in North Carolina parlance, if you had any bias in favor of Deering Milliken, you sure did take a poor way to show it.

I will have some other things later, but I don't want to postpone any of my other brethren from asking questions.

I renew my statement that although I have never had the privilege of knowing you personally, I have read your opinions over the years and they have left me with an abiding conviction that as a member of the Court of Appeals of the Fourth Circuit you have discharged your duties as a judge with the cold neutrality of the impartial judge.

Thank you.

Judge HAYNSWORTH. Thank you very much, sir.

Senator ERVIN. I want to put all these court opinions in the record at this point.

The CHAIRMAN. They will be admitted.

Senator ERVIN. Including the decision of the Supreme Court of the United States.

(The opinions referred to appear in the appendix.)

The CHAIRMAN. Senator Hart.

Senator HART. Mr. Chairman, I yield to Senator Bayh, who I understand would like to make an inquiry.

Senator BAYH. I only make the inquiry because Senator Ervin suggested that out of courtesy to some of the rest of us he would not proceed with the rest of his questions, and I take the liberty of asking our chairman to ask our distinguished witness to be with us in the morning again so that we can pursue this.

The CHAIRMAN. That has been done. He will be available tomorrow.

Senator BAYH. I am sure that our jurist doesn't need any advance notice, but I think it is only fair to suggest there are three basic areas that I would like to pursue tomorrow, and I think they have been hashed and rehashed. You covered some of them, today, I would like to put them in proper perspective, one area being the law firm relationships. You touched on that briefly.

Two. The Vend-A-Matic relationship, which was also touched on.

And third, I hope we can get into the matter of just what responsibility you as a member of the U.S. Supreme Court, or indeed as a member of the Appellate Court, have to remove yourself from any question of doubt.

It is a burden that is not an easy one to carry, but I think it is one that is in many people's minds right now.

With that, Senator Hart, I appreciate your courtesy.

Senator HART. I understand, Mr. Chairman, that Senator Tydings, who urged that we continue this afternoon, did so because of a heavy schedule tomorrow.

Senator TYDINGS. That is right.

Senator DODD. If we are going to sit tomorrow, I ask leave to yield now to Senator Tydings.

Senator TYDINGS. I thank my colleague.

Mr. Chairman, before addressing questions to Judge Haynsworth, let me make a brief statement.

During my 5 years as a U.S. Senator I have been privileged often to participate in the Senate's constitutional function of advising and consenting to Presidential appointments to the Federal Bench. The men whose names have been placed before the Senate have held a wide range of philosophical, social, and political views. Their views

have seldom been amenable to meaningful classification. For this reason, I do not believe that the Senate should ordinarily take upon itself the chore of attempting to define a judicial nominee's positions on substantive issues that may appear before the Supreme Court, nor do I believe that the Senate should seek to shape the Federal courts in its own political image.

In considering those named by the President for the vacancies on the Federal district and circuit courts over the past 5 years, and in considering previous nominees to the Supreme Court, I have consistently adhered to that position that, barring some unusual situation, a man selected by the President for the Federal bench should be confirmed by the Senate if he has demonstrated a proper judicial temperament, an intellectual capacity equal to the task set for him, and a character beyond reproach.

In addition, I believe a nominee to the Supreme Court should subscribe to a judicial philosophy which in general would contribute to the High Court's critical role in our system of government. At the same time, however, I have long believed that an individual Senator's agreement or disagreement with the views that he believes the nominee holds on particular issues or his findings in particular cases should not be a controlling consideration on the issue of the nominee's confirmation.

Consequently, I will not make a final determination on the confirmation of the nominee before us based on the criticism that has been leveled at him for certain decisions he participated in as a judge of the Fourth Circuit Court of Appeals. I have reviewed his position in this and other cases and, not unexpectedly, have found that I disagree with many of his votes while agreeing with some others. I disagree with his dissent in *Simkins* v. *Moses Cone Memorial Hospital*. I believe with the majority of the court that there was sufficient State action involved in the hospital grants to dictate the application of the tenets of the 14th amendment.

On the other hand, I applaud his opinion, and it was a brilliant opinion, in *United States* v. *Chandler* in which his court adopted the humane and modern definition of insanity proposed by the American Law Institute.

I disagree with his decisions, at least partially, in the *Darlington Manufacturing Company* case but applaud his position in *Langford* v. *Gelston* which enjoined unfounded nighttime police raids in ghetto areas in my own city of Baltimore.

In sum, if I had been sitting with Judge Haynsworth on the Fourth Circuit Court of Appeals, I would have dissented from his position in some cases and joined with him in others. No doubt many of my senatorial colleagues on this committee would view the same cases differently, but such views would not in my opinion disqualify them from service on the Federal bench.

I have had the privilege of knowing Judge Haynsworth well. As U.S. attorney for the district of Maryland, a State encompassed in the fourth circuit, I frequently had occasion to argue before his court. On some of those panels I believe he sat, although I am not certain. As a Senator from Maryland, I have consulted with him about matters of particular significance to the U.S. district court for the district of Maryland and on other subjects involving court reform.

As Chairman of the Subcommittee on Improvements in Judicial Machinery, I have worked closely with Judge Haynsworth, a member of the Judicial Conference, on matters of significance to judicial reform to the entire Federal judicial system.

I think I can say as a lawyer in the fourth circuit I found Judge Haynsworth, as a judge, to be thoughtful, fair and openminded, and as an administrator and because of my subcommittee chairmanship I have become aware of the work of the chief judges of the several circuits, I have found him to be innovated and, indeed, dynamic. Under his leadership the fourth circuit has made significant strides in eleminating its backlog and expediting the flow of its judicial business.

Now, following the nomination of Judge Haynsworth to the Supreme Court, a number of questions have arisen regarding the judicial propriety of the judge's business connections with Carolina Vend-A-Matic, Inc. The allegations and innuendoes of judicial imprudence are threefold. First, there is the allegation that the judge should not have retained his interest in the corporation after he ascended the bench. Second, that Judge Haynsworth should have disqualified himself from hearing the *Darlington Manufacturing* case because of Carolina Vend-A-Matic's business ties with Deering Milliken, Inc., a parent company of Darlington or at least a controlling factor in Darlington's business affairs.

Finally, some maintain that Judge Haynsworth should have recused himself from hearing the case because of Carolina Vend-A-Matic's connection with a law firm retained by one of the litigants in the *Darlington* case. In fairness to Judge Haynsworth, the Senate and the Court, the hearing record should reflect in full detail the facts underlying these matters.

And, Judge Haynsworth, because of my desire to have all the facts regarding this matter brought to light, I will ask you a number of questions, some of which you have covered in part in your statements and answers to questions propounded by members of the committee.

Let me ask you first, Judge Haynsworth, while you were on the Federal bench did you ever receive any compensation as an officer of Carolina Vend-A-Matic, did you ever receive any compensation as an officer or trustee of any subsidiary of Carolina Vend-A-Matic or of any retirement fund set up or controlled by Carolina Vend-A-Matic?

Judge HAYNSWORTH. No, sir; I did not. I was—I was a trustee of a retirement fund that was set up a few years before it was sold, but I was, there was no compensation for what I did as such. I did receive director's fees. That was the only compensation I received.

Senator TYDINGS. The extent of your financial interest was your shareholdings or the stock——

Judge HAYNSWORTH. Yes, sir.

Senator TYDINGS (continuing). Which you have already enumerated to this committee?

Now, in your response to the letter which Senator Hart and I submitted to the chairman you stated that you met informally with the directors at a luncheon each week.

I wonder whether you would be kind enough to outline to the committee what duties you performed for Carolina Vend-A-Matic both at

these luncheon meetings or at any other time while you were on the Federal bench?

Judge HAYNSWORTH. First, let me say in the earlier history before I went on the bench my attendance at these directors' weekly luncheons, meetings were very infrequent. After I came on the Court, I think perhaps they were more frequent, because when I was in Greenville and not in Richmond, these were friends of mine, and it was a pleasant experience for me to meet with them at lunch.

The meetings there were very informal. We were friends. We talked about many things besides Vend-A-Matic business. If there was anything to talk about, of course we did.

My particular interest, as I attempted to indicate, sir, was in its financing and its bank loans. And the only service that I rendered aside from general consultation at some of these weekly meetings was arranging for and keeping a watchful eye upon its finances.

Senator TYDINGS. In relation to its financing, I think you stated in response to a question of either Senator McClellan or Senator Eastland that in addition to your initial investment in Carolina Vend-A-Matic you personally were liable on some notes for money borrowed to get the business started.

Judge HAYNSWORTH. Yes, sir.

Senator TYDINGS. You indicated, I think, that the liability was around $100,000. I wonder if you could give us just for the record, either now or later, the exact amount of your liability.

Judge HAYNESWORTH. Senator, I don't know. I could perhaps from the bank find out the extent to which they were endorsed. I know when the two stockholders dropped out they got concerned when the amount of those loans passed $50,000. The rest of us were not concerned and we wanted to go, and did go, on.

From the financial statements that I have filed—I don't have them in front of me now—these notes got up to approximately $300,000 in 1963, but by that time I also know that we were getting some credit without endorsement. But now—but I can't offhand break down the $300,000.

Senator TYDINGS. So your initial investment was more than the $2,300. There was also liability on some substantial notes.

Judge HAYNSWORTH. If it had gone bad, my losses would have been a great deal more than the cash I put up, yes.

Senator TYDINGS. Now, did you at any time ever directly or indirectly contact any officer, director or employee of Deering Milliken to obtain vending machine contracts for Carolina Vend-A-Matic?

Judge HAYNSWORTH. I did not, never.

Senator TYDINGS. Did you ever make any telephone calls——

Judge HAYNSWORTH. Never.

Senator TYDINGS (continuing). To any officer of Deering Milliken to obtain business for Carolina Vend-A-Matic?

Judge HAYNSWORTH. Never.

Senator TYDINGS. Did anybody in your family ever make any telephone calls to any such officer or director?

Judge HAYNSWORTH. Never.

Senator TYDINGS. As a part of your work, or as a part of your association with Carolina Vend-A-Matic did you formally or informally seek to obtain business for Carolina Vend-A-Matic?

Judge HAYNSWORTH. Never. I did not. This was not a matter of my interest, and I felt that it, what it had to offer should be sought on the basis of its own merit and that that's the way it should acquire whatever business it got.

Senator TYDINGS. Did you receive director's fees for the luncheons, the directors' meetings, you attended of Carolina Vend-A-Matic?

Judge HAYNSWORTH. I did from the time it began to pay such fees, which was not at the outset. And this will show in my income tax returns, when I began to receive such fees. But at a time around 1954 or 1955 it did begin to pay directors' fees and from that time on I received them.

Senator TYDINGS. Do you recall the highest director's fees, or what your director's fees were at the highest time?

Judge HAYNSWORTH. No, sir. They were not, they were not large. And again, I don't have my returns in front of me, but I think they were, I would say they were modest.

Senator——

Senator TYDINGS. Well, you can supply that report for the record.

Judge HAYNSWORTH. All right, sir.

Senator TYDINGS. I won't——

Judge HAYNSWORTH. I think I can find it.

Senator, in 1963 the fees were more than earlier years. This was the last—well, no, I resigned—that year I reported $2,600 in director's fees.

Senator TYDINGS. Right. Were you involved——

Judge HAYNSWORTH. I can tell you what it was in 1962, if you would wish, because——

Senator TYDINGS. That was the highest, wasn't it, the $2,600?

Judge HAYNSWORTH. Let me check and be sure.

Senator TYDINGS. All right.

Judge HAYNSWORTH. I am sorry to fumble for this, but these are hard for me to make out.

Senator TYDINGS. Judge Haynsworth, when was the last time you attended a directors' meeting?

Judge HAYNSWORTH. Senator, I don't know. It was some time in the fall of 1963. I submitted the letter on October 15th, and it was some time prior to that.

Senator TYDINGS. You attended no directors' meetings after 1963?

Judge HAYNSWORTH. Oh, no, sir.

Senator TYDINGS. As I understand from your statement which you submitted and a letter, you resigned as a director as a result of the directive or the rule which was adopted by the Judicial Conference of the United States?

Judge HAYNSWORTH. I did, sir.

Senator TYDINGS. Were you involved in obtaining financing or lines of bank credit for Carolina Vend-A-Matic after you became a judge on the fourth circuit?

Judge HAYNSWORTH. Senator, if I was at all, it was to a very small extent. It was about that time we secured the services of Mr. Wade Dennis, and after he came in he handled all such relations with the bank.

Senator TYDINGS. At the time you participated in hearing and decid-

ing the Darlington Manufacturing Co. case, were you aware of Carolina Vand-A-Matic's business connections with Deering Milliken, Inc.? And if you were, will you tell the committee what the extent of your knowledge was of these business ties?

Judge HAYNSWORTH. Senator, it's not easy to recall now what precisely one knew or did not know in the summer and early fall of 1963 when just after that I went into it in great detail.

I again say I knew precious little about the locations of the vending machines. I wasn't particularly concerned with where they were. And I cannot say that I had not heard that we had machines in any one of these three plants. I do not know that I heard they were in any. And if I heard they were in any, I don't know that I would have known that they were related to Deering Milliken.

But I certainly, if I had been asked, I knew that we had machines in a miscellany of plants and if I had been asked I certainly would have responded, we might have some at least in some plants related to that concern. But I had no consciousness of what I later found out all the facts to be.

Senator TYDINGS. In your letter to Senator Eastland in response to Senator Hart's and my queries, you indicate that in the fall of 1963 Carolina Vend-A-Matic had machines dispensing coffee, cold drinks, and candy in approximately 46 locations. Is that correct?

Judge HAYNSWORTH. There were plants where they had what we referred to as full line vending, where they have hot and cold foods. Of course, they had coffee machines and things of that sort in a variety of——

Senator TYDINGS. In more than that?

Judge HAYNSWORTH (continuing). Place. Oh, yes.

Senator TYDINGS. In more than 46?

Judge HAYNSWORTH. Oh, yes, sir. They were the 46 plants where they had what they called full-vending service where substantially complete meals might be had.

Senator TYDINGS. Notes from the board of directors' meetings of Carolina Vend-A-Matic indicate that in 1964, after you had given up your directorship and vice presidency in the company, that company leased certain property from you and other directors. What is the nature of that property and what income did you receive from this?

Mr. HAYNSWORTH. I did not understand what you——

Senator TYDINGS. Let me ask you this. According to the notes from the board of directors' meetings of Carolina Vend-A-Matic, I gather that after you had given up your directorship and position in the company, the company leased some real estate, some property from you and other directors. Is that a fact?

Judge HAYNSWORTH. Well, I don't know—when ARA wanted to acquire the stock, they did not wish to acquire a warehouse building that we had and some land that it was on. And because it did not wish it a distribution was made in kind of that land and warehouse building and we then became its owners.

Senator TYDINGS. Let me just read to you the note here from the minutes and then maybe it will refresh your recollection:

At the weekly Board of Directors' meeting on April 6, 1964 resolution was passed that certain property he leased from C. F. Haynsworth, Jr. and some of the present Directors and Officers of the company.

Do you recall what that property was? That was in April 1964.

Judge HAYNSWORTH. This was just at the time the arrangement with ARA was concluded, and the only thing I can think of just now is I know this warehouse and land, the distribution of that was made in kind and we leased it back.

Senator TYDINGS. In other words, part of the assets of the company at the time was certain real estate, and, as a part of the sale or the merger, you and others received a distribution of assets——

Judge HAYNSWORTH. In kind.

Senator TYDINGS. In kind—and then you leased——

Judge HAYNSWORTH. We leased it back.

Senator TYDINGS. Do you recall the income you received from the lease?

Judge HAYNSWORTH. Well, the value of the distribution was reported as ordinary income, of course, and I believe it showed in my income tax return approximately $9,000, my interest in the real estate. The income, I know that is referred to in the financial statement that's attached to my second statement, sir, and I can tell you what that is.

Senator COOK. Would the Senator yield?

Senator TYDINGS. Yes.

Senator COOK. I think it is under "real estate" if I am correct, Judge.

Judge HAYNSWORTH. Yes, sir.

Senator COOK. "1. Undivided interest in a tract of land upon which there is a warehouse"——

Judge HAYNSWORTH. Yes, sir.

Senator COOK. Known as ARA warehouse from which my net taxable income in 1968 was $548.

Judge HAYNSWORTH. Yes.

Senator TYDINGS. Thank you.

Judge, in a biographical sketch written by Mr. B. J. Phillips which appeared in the September 7th issue of the Washington Post it was reported that after World War II you were engaged, and let me quote his words, "In a lot of legal work behind the scenes which brought the large textile firms in from the North."

The article also reports that you did a great deal of legal work for the textile firms.

I wonder if you would care to comment on that statement and what type of practice or what association you did have with the textile firms.

Judge HAYNSWORTH. Well, beginning shortly after the second world war there began a general industrial expansion in the South. New plants were being built, and not just textiles, all kinds of industry. And many of the concerns interested in locating plants in the State came to me for legal advice. And being in the practice of law, I was not displeased to see them. And I did what I could to help them resolve legal questions which they had. Of course, they had a great many. But I served only as a legal adviser to them with respect to legal questions they would run into in connection with the location or construction of a new plant in my State.

If the implication is that I went out to such people and enticed them into the State, I didn't do that. I was a lawyer, not a salesman.

Senator TYDINGS. During your years in practice, did you do any legal work or did your firm do any legal work for Deering Milliken or any of its subsidiaries?

Judge HAYNSWORTH. Senator, for years and years we have represented Judson Mills, which is located in Greenville. At one time that amounted to a substantial amount of legal work.

Deering Milliken acquired control of that, and after that we did very little for it. Very infrequently we handled local things that had to be handled on a local basis, by local people. Its general work was handled by someone else.

Senator TYDINGS. Were you or your firm or any of your partners ever general counsel for Deering Milliken or any of its subsidiaries?

Judge HAYNSWORTH. Not only not general counsel, we were not counsel at all for them except in this one connection with Judson Mills which was controlled—the result of that control was substantial loss of that as a client, but we still would do some, handle local things that had to be handled on a local basis.

Senator TYDINGS. At the time of the Darlington Manufacturing Company case, do you know whether or not any of the officers, directors, and controlling stockholders of Deering Milliken were aware of your one-seventh interest in Carolina Vendomatic?

Judge HAYNSWORTH. I am sure they were not.

Senator TYDINGS. Why do you say you are sure they were not?

Judge HAYNSWORTH. Senator, as far as I am aware, no one outside of this very small group plus bankers in Greenville were aware at all of it. Nothing had been done to let it be known.

Senator TYDINGS. When did you first become——

Judge HAYNSWORTH. And in the reports that they filed, the people that had to do with the location of these things in their plants in 1963 have all said that they were not aware that I had any interest in it.

Senator TYDINGS. When the *Darlington Mills* case came before the court, did you consider disqualifying yourself?

Judge HAYNSWORTH. No, sir. It did not occur to me at all. But again I say I was not consciously aware of any connection I had, and I certainly was not aware of any financial interest I might have in the outcome of that law suit. And I am still not aware of any.

Senator TYDINGS. Judge Simon Sobeloff has written a law review article in this area of judicial conflict of interest. Let me quote him and I would like your comment on what relationship his comments, have to your decision to sit on the *Darlington Mills* case. Judge Sobeloff wrote:

> One can readily see that if a judge serves as an officer or director of a commercial enterprise, not only is he disqualified in cases involving that enterprise, but his impartiality may also be consciously or unconsciously affected when persons having business relations with his company come before him.

Now, would you comment on that statement and whether or not it has any relationship to your serving on the panel that heard the *Darlington Mills* case?

Judge HAYNSWORTH. Senator, I would say that what is important, of course, is not a technical office one holds unless he is active—if he is an active officer, of course, that could have all sorts of influence on what he did as a judge. In this instance, I had no active office with re-

spect to its outside affairs, though I was in 1963 a director and vice president. But the only influence that was borne on me was my interest as a stockholder. And this could have resulted in some financial interest if my interest as a stockholder was known and someone doing business with Vend-A-Matic sought to influence my vote by doing something I otherwise would not have done. But unless you make those assumptions, which I think are contradicted in the record, then I don't think there was or could have been any financial influence.

Senator TYDINGS. In the letter which you wrote to Senator Eastland in response to the queries of Senator Hart and myself, you stated that you have disqualified yourself in cases in which you had a stock interest in a party or in one which would be directly affected by the outcome of the litigation.

Would you tell us the circumstances involved in these cases?

Judge HAYNSWORTH. Well, the only ones that I can actually recall are the cases of a concern in which I actually held stock, J. P. Stephens, for instance; I have not sat on their cases.

Senator TYDINGS. In your statement to Chairman Eastland you observed that the judges of the fourth circuit have brought their interests, if they had an interest in a matter being litigated before them, to the attention of the parties involved.

Now, did you do this in the *Darlington* case?

Judge HAYNSWORTH. No, sir; because I did not regard myself as having any financial interest in the outcome, and I still do not.

Where that has arisen, and it has been done recently, with respect to one particular judge, where he has had a very small interest in a national concern, stock interest, and he has found it out on the eve of the hearing, in those instances this direct, immediate stock interest in a party has been reported to the lawyers—it is done by the clerk—assuring that if either side has the least objection to his having a part a substitution would be made. In each instance the lawyers concerned said they did not wish him to withdraw. But this is the case of a very small but direct stock interest.

Senator TYDINGS. Judge Haynsworth, as you know, our Subcommittee on Improvements in Judicial Machinery has been active in the field of judicial reform and indeed you have been one of those jurists in the Nation who have supported us in our efforts to create a Federal judicial removal commission and to require financial disclosure by judges.

I have been recently referred to one statement that you made on June 2 of this year in a hearing before my subcommittee. We were discussing the general area of judicial disclosure. Let me read a question which I propounded to you and an answer which you gave, and then I would appreciate it if you would explain the answer.

This is my question. And this related to what a judge should disclose in a financial statement.

My question:

What about the disclosure of the name and address of each foundation, eleemosynary institution, and each business and professional corporation, firm or enterprise in which the judge was an officer, director, proprietor or paortner during the preceding year?

Your answer:

Judge HAYNSWORTH. I certainly would have no objection to such a thing as that. I don't believe most judges would. I think there is very little remnant of that.

Now comes the part of your answer which I would like you to clarify.

Of course, when I went on the bench I resigned from all such business associations I had, directorships and things of that sort. The only one I retained is the trusteeship of this small foundation which I mentioned in my main statement, and I think that perhaps the best rule for a judge to go by now is to stop doing even that much.

I believe, Judge, that when you went on the bench you did not resign from all business associations. You resigned from all except two.

Judge HAYNSWORTH. All but two; that's correct, sir. But by the time I was there I had resigned from those, and the only thing I retained was this trusteeship of this small foundation to which I referred.

Senator TYDINGS. In 1964, Judge Haynsworth, you were selected to serve on a panel of judges whose purpose was to consult with the American Bar Association's Committee on Professional Ethics about all questions involving the canons of judicial ethics.

I wonder if you would tell us about the nature of this panel and the extent of your participation on it.

Judge HAYNSWORTH. We get—this is a committee of judges, and any question that arises in the American Bar Association Committee on Ethics involving judicial ethics is referred to us by mail. We get inquiries by mail and we respond by mail. We never have met in a group. But we receive specific inquiries with requests for responses, and I respond to them.

Senator TYDINGS. How many such inquiries have you received?

Judge HAYNSWORTH. Not a great many.

Since I have been on, just a guess, 6 or 8.

Senator TYDINGS. Do you write opinions in connection with these queries or——

Judge HAYNSWORTH. The response is by informal letter.

Senator TYDINGS. Who is the chairman of that panel?

Judge HAYNSWORTH. The chairman has been a gentleman in St. Louis whose name is outside of my——

Senator TYDINGS. Is he is lawyer or a judge?

Judge HAYNSWORTH. He is a lawyer.

Senator TYDINGS. How many judges are on it and how many lawyers are on it?

Judge HAYNSWORTH. The group on which, of which I am one, I think, are all judges, but we serve to advise only—the chairman is the chairman of the Committee on Ethics that has to do with lawyers' ethics, everything, and the only function we serve is when he has a question involving ethics of a judge, he consults us by mail and——

Senator TYDINGS. In other words, whenever a lawyer——

Judge HAYNSWORTH (continuing). We respond by mail.

Senator TYDINGS. Whenever a lawyer complains to the ABA Committee on Professional Ethics, those inquiries involving judicial canons get an advisory opinion from your group?

Judge HAYNSWORTH. This is individual. Sometimes it arises by a judge raising a question, should I or should I not do this?

Senator TYDINGS. The Judicial Conference in 1963 adopted the resolution that a justice or judge in the United States shall not serve in the capacity of an officer, director, or proprietor of an organization organized for profit. Do you support this resolution?

Judge HAYNSWORTH. Well, I was not a member at the time. I learned about this just after it was done. And I had not thought that the reason for not doing such things applied to the two small concerns that I remained as a director of. But when rules are adopted I recognize they ought to be sharp and clean, and I promptly accepted what the conference had done and resigned from these two directorships.

Senator TYDINGS. Well, do you think it a fair statement that the rules for conduct or deportment of Federal judges or the tenets of ethics so far as the members of the Federal bench are concerned have been so illusory or hazy as to really be ineffective insofar as providing real guidance for members of the bench?

Judge HAYNSWORTH. Senator, I am very certain it could be improved, and the Committee on Court Administration is now at work attempting to devise more specific rules. I hope they can come up with something.

Senator TYDINGS. In your statement that you submitted to the committee, you stated that your recollection was that you resigned as vice president of Carolina Vend-A-Matic in 1957. Can you explain why you were carried on the books of the company as vice president until 1964?

Judge HAYNSWORTH. Yes. It's a case of the shoemaker's children.

The meetings we had were extremely informal, as I said, usually at lunch, and I am sure what happened was that after this a motion was made to reelect the same group to serve as officers from the year before, and the minutes for that year were picked up for the next year.

Senator TYDINGS. Did you ever receive any salary or remuneration as vice president of Carolina Vend-A-Matic while you were on the Federal bench?

Judge HAYNSWORTH. No, sir.

Senator TYDINGS. Judge Haynsworth, as you know, in the 90th Congress and again in the 91st Congress I introduced a bill to provide for the filing of certain financial reports and certain disclosures by judges and justices of the United States.

I would like to know whether you would comply with the provisions of this bill if you are confirmed by the U.S. Senate, and particularly I wish to know if you would object to filing with the Judicial Conference of the United States the following reports on your personal financial interests:

1. A report of your income and spouse's income for the preceding year and the sources thereof and the amount and nature of the income received from each such source;

2. The name and address of each private foundation eleemosynary institution and each business or professional corporation, firm, or enterprise of which you are an officer, director, proprietor, or partner during the preceding year;

3. The identity of each liability of $5,000 or more owed by you, or by you and your spouse jointly at any time during the preceding year;

4. The source and value of all gifts in the aggregate amount of a value of $50 or more from any single source received by you during the preceding year except gifts from your wife or your children or your parents;

5. The identity of each trust or fiduciary relation in which you held a beneficial interest having a value of $10,000 or more and identity, if known, of each interest or trust or other fiduciary relation in real or personal property in which you held a beneficial interest having a value of $10,000 or more at any time during the preceding year;

6. The identity of each interest in real or personal property having a value of $10,000 or more which you owned at any time during the preceding year;

7. The amount and source of each honorarium of $300 or more received by you during the preceding year, and finally, the source and amount of all money other than that received from the U.S. Government received in the form of an expense account or as reimbursement for expenditures during the preceding year.

Would you have any objection?

Judge HAYNSWORTH. I would not at all. As you know, while the proposal has not been as detailed as the ones you have now read, I have been in support of such a requirement.

Senator TYDINGS. During your service on the Judicial Conference and particularly this past year did you support the resolution dealing with judicial disclosure proposed by the Chief Justice?

Judge HAYNSWORTH. I did.

Senator TYDINGS. Do you feel that those resolutions help clarify the requirements of judicial ethics?

Judge HAYNSWORTH. Well, I hope they are going to be put in more detailed, explicit form. This should come up at the meeting to be held next month. I think there is a lot more to be done than has been done. But I was in support of what was done at the meeting in June.

Senator TYDINGS. Do you favor their application to the members of the Supreme Court as well as to other members of the Federal bench?

Judge HAYNSWORTH. The question is whether or not the Conference can make them apply.

Senator TYDINGS. Legally I don't think the Conference can, but I am inquiring whether the Supreme Court itself should adopt the same rules.

Judge HAYNSWORTH. But if the Senate in its wisdom should confirm me for the Supreme Court, I will comply with whatever lower court judges do.

Senator TYDINGS. Judge Haynsworth, from your letter and your statement it is my understanding that at some time during the period you were on the Federal bench, in either 1963 or 1964, Carolina Vend-A-Matic retained a law firm to incorporate a subsidiary and that same law firm subsequently was counsel of record for the Darlington Manufacturing Co.

Would you give us the facts of that situation as you know them?

Judge HAYNSWORTH. Senator, I knew nothing in the world about it at the time. I do know that earlier when a subsidiary was organized in Georgia, my former law firm procured the help of a law firm in Au-

gusta which supplied the initial directors, incorporators, and so forth, and turned the corporate shell back.

On inquiry when this came up, I found out the same thing had happened in North Carolina, and the reason this particular law firm in Greensboro was requested to do that was a close personal friendship between one of my former law partners, Francis Marion and Willy Holderness, a member of the Greensboro law firm. They frequently called on each other for that kind of work.

But a corporate shell was formed up there, then returned to——

Senator TYDINGS. How big was the law firm in Greensboro, how many lawyers, roughly? Was it one of the biggest firms?

Judge HAYNSWORTH. Yes, sir. I don't know the number of its partners but—Senator, I am guessing but they must have 10 or 12 or 15 men.

Senator ERVIN. If I may interject myself at this point, I am very familiar with that law firm.

Senator TYDINGS. How big is it?

Senator ERVIN. The firm offered me a partnership years ago. I wish I would have taken it. They have about five or six partners and they probably have 25 or 30 lawyers, I imagine.

And incidentally, Bill Holderness, who is now unfortunately dead, killed in an accident, his firm was in the *Darlington* case, but the man that handled the *Darlington* case for his firm was Thornton Brooks. Bill Holderness, I know, didn't do trial work at all. He did counseling and drawing of papers, and he was a very excellent lawyer. That firm is one of the finest law firms in ability and integrity in the United States.

Senator TYDINGS. Well, now, Judge Haynsworth, as I understand, for the record, the name of the firm was McLendon, Brim, Holderness and Brooks.

Judge HAYNSWORTH. Yes.

Senator TYDINGS. And that the subsidiary to Carolina Vend-A-Matic was called Vend Co., and the three partners of the firm actually were appointed directors, at least directors of record for the subsidiary, and those three partners of the firm were W. H. Holderness, G. Neil Daniels, and Kent M. Brim. It's also my understanding that the counsel for Darlington in its case before the Fourth Circuit was Thornton Brooks, another partner.

Judge HAYNSWORTH. That's correct.

Senator TYDINGS. I wonder if you could tell us whether or not Mr. Thornton Brooks, who was the partner who handled the *Darlington* case, had any knowledge of the fact that other lawyers in his firm had incorporated a subsidiary to Carolina Vend-A-Matic, or had any knowledge of any relationship which you had to Carolina Vend-A-Matic.

Judge HAYNSWORTH. Well, I have no reason to suppose that Mr. Brooks knew, but, of course, I don't know. Of course, at the time this inquiry was made, he then knew of my relation to Vend-A-Matic.

Senator TYDINGS. In the letter to Judge Simon Sobeloff, Chief Judge of the U.S. Court of Appeals, dated January 13, 1964, under letterhead of McLendon, Brim, Holderness and Brooks and signed by

Thornton H. Brooks, the first paragraph reads as follows, and my question to you is do you have any knowledge to the contrary?

This is a letter to Judge Sobeloff. It says:

Your letter of January 7, with enclosures, was received by my office during my absence. Serious allegations and inferences contained in the letter of Miss Eames compel me to promptly reply to the extent possible at this time. The Court has solicited the comment of counsel for their clients, and I am replying on behalf of my client, Darlington Manufacturing Company, although it is no longer in existence. I understand that counsel for Deering Milliken, Inc., will communicate with the Court in due course as to Carolina Vend-A-Matic Company, about which I have no knowledge whatsoever.

Is that the fact so far as you know it?

Judge HAYNSWORTH. So far as I know, it is.

Senator TYDINGS. Judge Haynsworth, some able journalists have alleged that you were in violation of canon 26 of the Code of Judicial Ethics for 10 years by reason of the relationship you had with Carolina Vend-A-Matic. As you know, canon 26 provides, and I will read it, that

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss.

Would you give the committee your views on the application of canon 26 to your investment in Carolina Vend-A-Matic?

Senator KENNEDY. Would the Senator yield?

Could you just read the second part of that, as well?

Senator TYDINGS. Let me read the whole thing.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

I would like to hear, and I think the committee would like to hear your views on the application of canon 26 to your own investment in and relationship to Carolina Vend-A-Matic.

Judge HAYNSWORTH. Senator, of course I don't have—the vending concern was not likely at all to be involved in any law suit in my court.

Senator TYDINGS. Was it ever involved in a law suit?

Judge HAYNSWORTH. No, sir. No, sir. It was much less likely to be involved in any large concern in which investments, of course, might be approved, like Chrysler or GM or such things as that, with widespread business all across the country.

Senator TYDINGS. The second part of that first paragraph says:

It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgement, or prevent his impartial attitude of mind in the administration of his judicial duties.

Would you comment on that?

Judge HAYNSWORTH. Well, this is directed, I suppose, to relations with gamblers and people like this, with backgrounds that were suspect or shady. And I have had no such relations.

Senator TYDINGS. When was the first time there was any public knowledge or awareness that you were an investor or stockholder in Carolina Vend-A-Matic?

Judge HAYNSWORTH. I don't think that became known until after this appointment. It became known to the people involved in this law suit, of course, in December 1963. But I don't think it went much beyond that. But the fact——

Senator TYDINGS. Was that the first time it became a matter of public knowledge?

Judge HAYNSWORTH. It was not then known, as far as I know, except to the Textile Workers Union and officials of Deering Milliken and the lawyers and members of my court, and so on, but not generally known elsewhere. But then I was concerned that others might know, and this is what impelled me to take extraordinary steps to rid myself of the stock at that time.

Senator TYDINGS. Judge Haynsworth, at the time of the Darlington Manufacturing case, what was the financial extent of any investments you might have had with any southern textile companies?

Judge HAYNSWORTH. Senator, at that time I owned a small amount of stock in J. P. Stevens. I haven't bought or sold anything since. So it is as reported in my statement.

I owned stock in Dan River Mills, which is in the statement; a small amount of stock in Southern Weaving, which is in the statement. I don't think there has been any change in any of those since 1963.

Senator TYDINGS. They are basically as you submitted it to the committee?

Judge HAYNSWORTH. As reported now.

Senator TYDINGS. Do you know what percentage of Carolina Vend-A-Matic's business was in 1963 with textile companies?

Judge HAYNSWORTH. No, sir. And going down the list, I can't—I don't know—of the list in the file, I don't know whether some of them are textile concerns or not. Some I know are, some I don't. But I have no idea what the proportion is.

Senator TYDINGS. Judge Haynsworth, in 1961, when you wrote the opinion in Deering Milliken, Inc., versus Johnston, which I think Senator Ervin went into, a matter which was related to the *Darlington* case, didn't this give you any forewarning of a possible conflict of interest problem which might arise?

Judge HAYNSWORTH. I don't know that I understand, sir.

Senator TYDINGS. Well, when you sat on that case, did the problem of conflict of interest ever occur to you?

Judge HAYNSWORTH. No, sir; it did not.

Senator, I was not consciously aware of any business connection with Deering Milliken at all. I never had been their lawyer. I personally had no connection with them. I wasn't personally aware of this vending concern deal. It is possible that other stocks that I owned, that those in turn may have had business with them, too, but I don't know. I certainly wasn't consciously aware of that, and I think the

conclusion of the lawsuit in 1961, which Senator Ervin suggested, was adverse to them. It was not in their favor.

Senator TYDINGS. In the portfolio which you submitted to the committee in response to the letter from Senator Hart and myself which specifies all your investments and the number of shares in each, well, there are better than 30 or 40 different companies——

Judge HAYNSWORTH. I own a few shares in Chrysler. It buys carpets. I don't know from whom. But it may buy some from this concern. But I don't know that it does. But I see them in cars. I know they must acquire them from some producers of such goods.

The CHAIRMAN. There is a call for a vote in the Senate. Suppose we go over to 10:30 in the morning.

Senator TYDINGS. Mr. Chairman, I would like to thank Judge Haynsworth. That would conclude the questions which I have to propound to him.

The CHAIRMAN. We will meet at 10:30 tomorrow.

(Thereupon, at 4 p.m. the hearing recessed to reconvene tomorrow, Wednesday, September 17, 1969, at 10:30 a.m.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

WEDNESDAY, SEPTEMBER 17, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:40 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Tydings, Hruska, Fong, Thurmond, Cook, and Mathias.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. The committee will come to order.

Judge Haynsworth.

Judge, yesterday Senator McClellan asked you about some figures on the profit derived from Carolina Vend-A-Matic from Deering Milliken. Have you received those figures?

TESTIMONY OF HON. CLEMENT F. HAYNSWORTH, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge HAYNSWORTH. Yes, I have, Mr. Chairman.

Senator MCCLELLAN. The information I sought was out of the $100,000 which were gross receipts that were received by your company from the—was it the Darlington Co.?

Judge HAYNSWORTH. Not it, but Deering Milliken.

Senator MCCLELLAN. Yes, from one of their affiliates—or two of their affiliates, I believe. You received, your company received $100,000 gross. And I asked you what was the net profit to your company and what your share of that profit would be.

Now, do you have those figures?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. You have those by telegram, I believe, is that correct?

Judge HAYNSWORTH. Yes, sir. This is from Mr. Dennis who was the head of Vend-A-Matic at the time and is now a regional official of ARA. And he says the average profit would have been $5,460 before taxes; after taxes, $2,730. And one-seventh of that would be $390.

Senator MCCLELLAN. $390 would have been your share of the profits?

Judge HAYNSWORTH. Yes.

Senator MCCLELLAN. I ask, Mr. Chairman, that the telegram be admitted into the record.

The CHAIRMAN. It will be admitted into the record.

Senator MCCLELLAN. I thank you.

(The telegram referred to follows:)

ATLANTA, GA., *September 16, 1969.*

Judge CLEMENT F. HAYNSWORTH Jr.,
Care Senator James O. Eastland, Judiciary Committee,
Washington, D.C.:

From the best information quickly available gross receipts of $100,000 from Magnolia, Gayley, and Jonesville plants of D. M. Co., the approximate revenue and net is as follows:

Gross receipts: $100,000
Commission paid mills: $9,000
Net receipts after commission to D.M.: $91,000
Average profit before taxes: 6 percent, $5,460
Profit after 50 percent income taxes: $2,730
One-seventh interest in $2,730 is $390

WADE H. DENNIS,
Regional General Manager, Southeast Region.

The CHAIRMAN. Now, I would like to call your attention to the fact that you played hell when you sold that stock; you got $437,000, and yesterday those 14,173 shares of ARA would have brought you $1,587,376. Therefore, you lost over a million dollars.

Judge HAYNSWORTH. Mr. Chairman, I didn't sell this because I thought it was not a good investment to retain.

The CHAIRMAN. Senator Bayh.

Senator BAYH. Thank you, Mr. Chairman.

I yield to Senator Hart, Mr. Chairman. He has to leave this afternoon.

The CHAIRMAN. He has preference if he wants it. I understood you to yield.

Senator HART. Judge, you are listening to somebody who is hung up with a long record himself. I have insisted that it is unwise and undesirable in confirmation hearings, with respect to sitting judges, to cross-examine them on specific cases.

As Senator Thurmond said in introducing you, you have a record—it speaks for itself and it shouldn't be confused by comment in the nonjudicial setting of this hearing room.

I don't intend to do it. But I now share the frustration of some of my colleagues who in the past few years have felt very strongly about the desirability of finding out how you could possibly come to certain judicial conclusions.

The second point: I hope that the letter which Senator Tydings and I addressed to you was not interpreted as an effort to embarrass or to chastise you.

Judge HAYNSWORTH. It was not, Senator. I assure you it was not.

Senator HART. As the letter indicated and as all of us by our questioning have shown, we sense a very serious responsibility now and hereafter to develop fully all interests of any nominee for the Federal courts. It is to the best interests, I am sure, not alone of the court and the committee, but of the nominee.

Judge HAYNSWORTH. Of course, sir.

Senator HART. And that is exactly what we have in mind.

So hung up on the proposition that we don't go through a line of questions on specific cases let me approach it this way:

We have been hearing for months, years, that what we need on the Supreme Court is a strict constructionist. Now, what is that? I take it you are one.

Judge HAYNSWORTH. Senator, I have been said to be one. I don't know—I don't know what it is and I certainly do not know that I am one. Again, one can read what I have written as judge and draw conclusions from it. But I have not labeled myself a strict constructionist. And I think if you read some opinions I have written, you would not think I was.

Senator HART. I am trying to find out what it is that I should establish as the standard against which to make that judgment. And apparently this definition was not discussed with you by the President who nominated you.

Judge HAYNSWORTH. The term has not been defined to me by anyone, sir.

Senator HART. I think it is politically a popular phrase, but we would all be the better off if it was more clearly defined.

Now, certainly in the mind of the man who nominated you, Earl Warren is not a strict constructionist.

That opinion is shared by many. I think he was an outstanding, magnificent Chief Justice.

Judge HAYNSWORTH. He is a very close friend of mine.

Senator HART. I am speaking now of what he did in terms of leading that Court in the direction that history will reflect was very timely, in the best long term interests of this country. He got into trouble because he said, among other things, that "separate but equal" wasn't equal and wasn't constitutional.

Do you agree with him?

Judge HAYNSWORTH. I certainly do.

Senator HART. He said that the right to counsel of a man under a criminal charge was a right that was available to rich and poor alike; if you couldn't afford it, you didn't lose it. We would provide counsel for you.

Now, do you think that is good?

Judge HAYNSWORTH. Senator, we have upheld that right again and again in my court.

Senator ERVIN. If the Senator will pardon me for committing an unpardonable sin, I am glad at long last the Senator from Michigan agrees with me that a Senator has a right to ascertain the view of a nominee for the Supreme Court.

Senator HART. I am ascertaining whether he agrees with Earl Warren.

Senator ERVIN. And I would like to say that I am glad to have a convert to my philosophy. However, I never did get one of the previous nominees to ever reveal any of his political or constitutional philosophy. And I was told at the time that it was highly improper for me to seek to ascertain it.

Excuse me. I won't interupt you any more.

Senator HART. I was trying to figure out a device that would enable me not to backtrack on the position I have taken earlier, and nonetheless——

Judge HAYNSWORTH. It is very hard to do.

Senator HART (continuing). And nonetheless find out if we were asked to consent to the nomination of a man who thought that the direction of the Supreme Court under Earl Warren should be reversed or modified.

Now, I think that is a fair question because on its answer hinges, I suspect, my vote.

Judge HAYNSWORTH. Senator, there are going to be some witnesses here who have seen many of the opinions I have written and what I have done, who can express their own opinions on the basis of the record that I have made, on where I stand. And I think, sir, instead of trying to label myself as to what kind of judge I am, that someone objectively who has read what I had written can do it much better than I.

As far as what you wish me to say what I would do after I am on the Supreme Court, if the Senate should confirm me, I don't think I should get into that. And this is the position, of course, you have had throughout. If I speculate now on what I am going to do in a particular field or in a particular case, as a Justice, if I become one, then I put myself in a position, too, that I couldn't sit on a case in that field when it came up.

Senator HART. You are right about that. And in the past I think and others I have been right in not trying to pin a nominee into a position that will estop him once he is on the Court.

But I think I have an obligation to myself to try to determine whether in your mind the direction and thrust that the record of the Warrent Court reflects is consistent with your own ideas.

Judge HAYNSWORTH. Well, I have a problem about—I would like to do all I can to help you in answer to your question, and I have a problem in my own mind as to how I can respond directly to that without getting into the realm of what I would expect to do as a Justice, if I become one.

But now in most of the areas in which the Supreme Court has been active within the last few years, we have had cases in my court, and I have sat upon them and I have written about them. And there are going to be witnesses here who will be prepared to talk about what I have done and where I have stood, from which I think you can divine what course I might take as a Justice.

But I don't think, myself, I should have a comment about it.

Senator KENNEDY. Would the Senator——

Senator HART. If I could just explain the reason I feel so strongly—the reason I seek to get this response.

We don't have to be Ph. D.'s in sociology to know that there is great alienation and hostility in the country. It is not the young alone. It is not the black alone. It is not the poor alone.

It has been my feeling that the direction of the Warren Court has strengthened the responsible leadership in this country which urges that inequities be corrected within the law. Slowing down the direction of the Warren Court assists only the irresponsible voices. That's my concern.

Judge HAYNSWORTH. I recognize it, sir, and I wish I could respond more directly; but I can't think now I might, except to give some idea of what my present thoughts about how cases would be held in the future in the Supreme Court, cases, of course, where I haven't read

the briefs or haven't heard the lawyers and in a field, too, which I think I should approach with an open mind when the case comes up, and not on the basis of some expression of a prior opinion.

Senator HART. Well, Mr. Chairman, let me ask that there be printed in the record about a dozen decisions which the nominee either participated in or wrote.

The CHAIRMAN. It will be made a part of the record.

(The material referred to follows:)

LIST OF CASES

LABOR MATTERS

NLRB v. *Rubber Workers (O'Sullivan Rubber Co.)*, 269 F2nd 694, (1959) reversed 362 U.S. 329.
United Steel Workers of America v. *Enterprise Wheel and Car Corp.*, 269 F2nd (1959), reversed 361 U.S. 593.
NLRB v. *Washington Aluminum Company*, 291 F2nd 869 (1961), reversed 370 U.S. 9.
Textile Workers Union v. *Darlington Mfg. Co.* (in record Tuesday, Sept. 16).
NLRB v. *Gissel Packing Co.*, 398 F2nd 336, (1968), 89 S.Ct. 1918 (1969).

CIVIL RIGHTS MATTERS

Griffin v. *School Board*, 377 U.S. 218 (1964).
Griffin v. *Board of Supervisors*, 322 F. 2d 332 (4th Cir. 1963).
Dillard v. *School Board of City of Charlottesville, Va.*, 308 F.2d 920 (4th Cir. 1962), cert. denied, 374 U.S. 827 (1963).
Bradley v. *School Board of the City of Richmond* 382 U.S. 103 (1965).
Bradley v. *School Board*, 345 F.2d 312 (4th Cir. 1965).
Gilliam v. *School Board*, 345 F.2d 325 (4th Cir. 1965).
Green v. *County School Board of New Kent County, Va.*, 391 U.S. 430 (1968), reversing 382 F.2d 338 (4th Cir. 1967).
Bowman v. *County School Board*, 382 F.2d (4th Cir. 1967).
Simkins v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

Senator HART. Admittedly, these are far short of all of the opinions on which we should form our own judgement.

Perhaps later, Mr. Chairman, I would have questions, but I yield now.

The CHAIRMAN. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

If I could, Justice Haynsworth, I would like to carry on just a little bit further the thrust of my colleague, Senator Hart.

I, too, share the belief that the judiciary and the Supreme Court have taken some of the most important and significant steps in terms of social change during the period of the Warren court. And although I would not ask with any specificity how you would vote in any kind of given situation that has been argued and debated within the Court over a given period of time, I think it would be certainly helpful to me to have some kind of appreciation expressed by you about some of the dynamic forces which exist within our society and that will reflect themselves in perhaps any number of different ways before the Supreme Court over the period of the next few years; for example, the frustration and the alienation of the young people. I can see this being expressed in cases that might come up in terms of first amendment rights for various servicemen—whether they are able to express their views on public policy off base, or on the base, and how their

first amendment rights are going to be protected. There is the whole question in the area of retention of attorneys and notification to indigent and poor people. Then there are the great frustrations which we have experienced with the narrow political process in terms of actual legislation, so that as Senator Hart has commented, many Americans do believe that only the judicial system offers them some hope of redress of grievances. And I feel very, very deeply that it would be helpful and useful for you, at least to the extent you can, to express at least your own views on what you feel are the root causes of what I believe are the most dynamic forces within our society—the frustration of youth and the frustration of minority groups—in terms of our system continuing to function.

I think it is really a very basic question and a basic concern. And I think it would be helpful—it certainly would for me—to have at least a feeling of the very deep kind of sensitivity, which I am sure that you feel, in terms of some of these forces which are very evident, which do exist in our society, and which are going to manifest themselves, I believe, in a host of cases that are going to come up before the Court. We should know what you think about the importance that these forces have within our country today, because I think all of us are aware that in many situations a Justice is really applying his own set of values and priorities, for example, on questions of granting certiorari.

Are these questions which you feel are really important and are sensitive to, or are they just something which you feel have little relevancy to our society today?

Judge HAYNSWORTH. Well, sir, I think they are of tremendous importance. These things are coming before my court now.

Of course, we are getting expanding contentions in conscientious objector cases. You mentioned this—first amendment cases. These are coming constantly. I have written upon it. I have sat on cases. Very recently we have handed down cases involving soldiers' protests, things of this sort.

I don't know what I can say more than that certainly I think it is of tremendous importance to the country as a whole and the response of the courts is of great importance to the country as a whole.

But again, as I answered Senator Hart, I don't know how I can express opinions in the context of problems in a particular area without speculating about what I might do if a member of the Supreme Court.

Senator KENNEDY. Well, just for myself, I was really more interested in how you view the frustrations of young people. I mean, for example, we are all so quick to talk about the questions of civil disobedience in terms of many of the young people in our society today. And in talking with these young people, they throw up the fact that in many instances judges themselves have failed to follow the laws as interpreted by the Supreme Court in terms of the establishment of basic rights for citizens. And they say, isn't it really just the first civil obedience and why should we be suddenly brought up and condemned?

What I am really interested in, and perhaps I am not making myself clear, is at least some awareness and concern on your part about

these forces and factors which I personally believe are the most moving forces in our country today, some appreciation of them, some understanding of them, awareness of why they exist, and a real sensitivity of what they can mean in terms of our whole system of judicial and legislative and executive action.

I think especially in terms of our judgment as Senators this is a proper criterion in the consideration of a nominee.

Judge HAYNSWORTH. Senator, as long as I can remember, there has been some gap in understanding between young people and older people, while perhaps today it is greater than at any other time in my recollection.

But I always thought it of tremendous importance that older people understand what goes on in the minds and hearts of younger people, as they should.

I can say I certainly attempt to. And I think if one reads all I have written in that field that I am—well, I don't want to characterize myself, but I certainly have written in this field, and I don't think you will find me unaware or unconcerned about the rights of folk who need protection of the law.

Senator KENNEDY. Do you have some feelings of why these movements of the poor and the yonng have developed and why they are expressing themselves in such a disenchanted way at the present time? Do you have some personal views on this?

Judge HAYNSWORTH. Of the underlying causes?

Senator KENNEDY. Pardon?

Judge HAYNSWORTH. Of the underlying causes?

Senator KENNEDY. Yes.

Judge HAYNSWORTH. Senator, they are so complex that I don't know that I could expound them in a short space of time, but our social and economic history provides a tremendous background for it.

Senator KENNEDY. Well, other than our looking back to our social and economic history, is this the response to that question that you want to give?

Judge HAYNSWORTH. Well, I think most of the young people today who are disturbed with what is going on think this country does not realize the promise it held for them when the Constitution was adopted and as history ensued since, and they are impatient to achieve realization of what they think ought to be the objective of our society. It is a very complex thing. Much is involved in it. But I am thoroughly aware that they are impatient, that they think the ultimate objectives have not been achieved, and they want to see them achieved.

Senator KENNEDY. Do you think there is any reason why they are more impatient today than, say, they were 10 or 15 years ago, 20 years ago, 50 years ago?

Judge HAYNSWORTH. Well, there is much broader concern on the part of everyone now than there was when I was a young man, for instance.

Most people weren't even thinking much about it.

Senator KENNEDY. I would like to, Mr. Chairman, yield at this point, with the right to come back.

Senator MCCLELLAN (presiding). Very well.

Senator Bayh.

Senator BAYH. Thank you, Mr. Chairman.

Judge Haynsworth, you have already been adequately welcomed by the committee. Perhaps it——

Judge HAYNSWORTH. It is nice to see you, too, sir.

Senator BAYH (continuing). Has not been too warm a welcome, but I repeat the congratulations on your being nominated by the President. It is not very often in a man's lifetime that such an honor comes to him and it happens to very few people at that.

There have been a number of questions raised, philosophical questions which you have suggested will be covered by other witnesses, so I will not pursue your thoughts on this.

I think, perhaps, the unfortunate aspect of this whole business is that there has been some question raised about ethics, personal integrity, and that's hard for any man to listen to. I personally am hopeful that all these matters will be laid to rest by the time we get through airing all the facts.

Judge HAYNSWORTH. I share that hope, sir.

Senator BAYH. I would like to make, if I might, one or two observations before asking Judge Haynsworth some questions.

It seems to me that over the past several years at least, some of us have had a feeling that the judicial system that has long been what I think we would have to describe as the stabilizing influence in our democracy, this system has become a target of increasing attack not only by the citizenry at large, but by some members of the bar.

Indeed, as we know, there have been overtures that a former Supreme Court Justice should indeed have been impeached.

It has been a most unfortunate period, in my judgment, as far as the degree of controversy which has been directed at the Court.

I think because of this and because of the fact that there seems to be a general concern—and I think this is a meritorious concern—on the part of an increased number of citizens, particularly among our young people, that we need to find ways to strengthen the standards of conduct of public officials, to put a new coat of paint on the system or the establishment, to make it more responsive, to make sure that the members that serve within it are beyond reproach.

This, related to the particularly unique position of the Court, I think, puts your nomination in a very special position in history and thus highlights the discussions before this committee.

Because of this I, personally, think that we, the members of this committee, indeed we, as Members of the Senate itself, have a rather unique opportunity, perhaps we should call it an obligation, to set, once and for all, uniform standards and criteria which will be applied specifically to each prospective judicial nominee.

I suggest that we consider the development of a standard set of questions dealing with personal, business, professional, and financial matters which will be applied to all nominees to the Federal judiciary. I think it would be an opportune time for this committee, and the Senate, to put the President, future Presidents, and all prospective nominees on notice that we in the Senate Judiciary Committee are determined to ask these questions before the fact, if you please, and not silently await some future date when our lack of foresight may bring embarrassment to a member of the judiciary, to the judicial system of

this country, and perhaps seriously further erode the confidence of the people of this country in our Government.

So with this suggestion, Judge Haynsworth, I would appreciate your willingness to address yourself to some questions:

I might say, before proceeding further, that it has been my opinion from everything that I have read, particularly from conversations that I have had with the distinguished junior Senator from South Carolina, Senator Hollings, who, as you know, is a strong advocate of your candidacy, that you are an honest man, with a fine reputation.

I want to deal now with the three general areas that I suggested yesterday. Looking at your law firm relationship—and I want to emphasize what I said earlier about the matter of ethical conduct. It is not merely a matter of maliciousness or intention to do wrong that we must deal with but it is a matter of degree and appearance.

Now, looking at your law firm, we have in the record its legal name and all of this. You have been a member of that law firm for a long time. I understand it was originally sort of a family-oriented firm with your grandfather and your father a part of it—it was sort of in the family tradition, wasn't it?

Judge HAYNSWORTH. Yes, sir; it was.

Senator BAYH. That is the kind of thing to brag about, I think, as a neophite member of the bar.

Now, what kind of practice was it? Was it in a specific area of the law? Was it general——

Judge HAYNSWORTH. General civil law practice, sir. We did not ordinarily handle crimes then. But a rather broadly based practice of law.

Senator BAYH. Did you deal with—well, I suppose you did deal with labor-management type cases?

Judge HAYNSWORTH. Infrequently. We were not specialists in that field, and many clients that we had, had their own labor law specialists.

Senator BAYH. Did you deal with utilities, bonding, financing of municipalities, schools, corporations?

Judge HAYNSWORTH. Yes, sir, all of those things.

Senator BAYH. Did you handle any patent law cases, or anything like that?

Judge HAYNSWORTH. I was in one patent law case. Most clients who got into a controversy about that did have a patent law specialist.

Since I have been on the court I have gotten into the patent law field rather extensively.

Senator BAYH. Did your law firm represent textile firms?

Judge HAYNSWORTH. Yes.

Senator BAYH. Do you have any idea how many?

Judge HAYNSWORTH. Senator, no, I don't recall now. We had a number. The principal textile client we had was J. P. Stevens, but there were others, also, that we represented.

Senator BAYH. Could I ask you to, so as not to catch you at all off guard, and realizing you have been on the bench for some while and your memory in those circumstances would be somewhat hazy—I have a list here of various clients that your law firm has represented, as listed in Martindale Hubbell, to what degree this list is accurate?

I would like for staff to clear with you the accuracy of these as much as some of these textile relationships were some years ago, cer-

tainly before you were on the bench. I don't want to leave any false inference here. If we could check this out, I would like to put it in the record, Mr. Chairman, after it has been cleared with our witness.

Senator McCLELLAN. Are you prepared, or will you be able to give the committee the names of all of the textile firms, textile companies your firm represented prior to the time that you went on the bench?

Judge HAYNSWORTH. I could go back to the records and have someone check the records, in my law firm, and produce such a list, Senator. I don't think I can now.

Senator McCLELLAN. If it is important, why, ask your law firm, if they will, to supply you such information as the record may reflect.

Senator BAYH. I may be erroneously informed, Mr. Chairman, but I have been informed that Judge Haynsworth's law firm does advise and counsel Martindale Hubbell on the accuracy of these matters in South Carolina.

Senator McCLELLAN. Does what? I didn't understand——

Senator BAYH. Does help in the preparation of the Martindale Hubbell information for South Carolina.

Judge HAYNSWORTH. It prepares the Digest of the State Laws for Martindale Hubbell.

Senator BAYH. Right. I see no reason why you should have committed to memory now, or recite from memory, all of the clients that you or your firm has represented prior to your going on the bench or, in fact, that your former firm represents now. And I don't want to even mention the firms involved here because there are several of them that had this relationship with your firm 5 or 10 years ago.

So let's clear this up so that we don't try to give a false inference.

Senator McCLELLAN. I don't understand what the point is. You asked him about textile firms he represents now. I don't suppose he has represented any since he has been on the bench.

Have you?

Judge HAYNSWORTH. No, sir.

Senator BAYH. Mr. Chairman, I suggested I thought it would be helpful, for the record, to find out what textile firms the judge's law firm represented prior to his going on the bench and what textile firms that same law firm, without his present services, represents now.

Senator McCLELLAN. Well, I would require him, if he can make it available—I think he should be required, if the committee wants it, to submit the names of textile firms that he represented, or his firm represented, prior to the time that he became a judge.

Now, I don't know that he is in a position to request his former firm to supply what industries they represent now. But if the committee feels that it is of interest, why, we can have one of them come up here and testify about it.

Senator BAYH. I don't want to press this, Mr. Chairman. I could introduce this compilation, which lists some 20 textile firms represented by the Haynsworth law firm, into the record.

I think that would be unfair, because some of these textile firms are not now represented by the firm. If the committee is not willing, I don't see why——

Senator McCLELLAN. I have no objection, but I don't think a judge who has been on the bench 10 years should be required to testify what

his former law firm is doing now. I just don't think that is a fair question to him. He should be required only to supply from his memory or with the firm's aid what firms he had any connection with while he was an attorney.

Senator BAYH. I concur in what the chairman said, 100 percent, about the requirement—I think I said that twice now about the advisability of the judge to provide this information.

Senator MCCLELLAN. Very well. Get your firm to supply everything it will and can. I have no objection.

Judge HAYNSWORTH. Yes, sir.

Senator BAYH. Prior to going on the bench, did you serve on the board of directors, or as an officer, in any textile firms in your area?

Judge HAYNSWORTH. A small concern, Southern Weaving Co., yes, sir. It made tapes, narrow fabrics, not broad woven fabrics.

Senator BAYH. Did any of your other law partners serve on the board of directors of any textile firms?

Judge HAYNSWORTH. I believe not; no, sir.

Senator BAYH. May I ask your opinion, if I may, without getting into a philosophical question, about the Deering Milliken case? Is it fair to say that was a pretty significant labor-management case?

Judge HAYNSWORTH. Senator, I don't—it was an important case, certainly, to the parties, as most cases are. And how much more so this was than others, I can't say. But, yes, quite a good deal was involved. Five hundred employees had lost their jobs. Yes, it was important.

Senator BAYH. I was thinking more about the confrontation that has existed, and does exist, between labor and management in the textile industry. The New York Times, December 10, 1964, quoted our illustrious senior colleague from North Carolina—I don't know how accurate this was, Senator Ervin. Alluding to the case it quoted the Senator: "It is not an exaggeration to say that free enterprise is the textile industry rides on this case."

Now, I don't know——

Senator ERVIN. I think free enterprise in all industries rode on that case, because if the ruling of the National Labor Relations Board had been upheld by the Supreme Court, no businessman in the United States could go out of business completely and permanently after he once started to operate a business that affected interstate commerce if any union ever got into his business. He would have to stay in business until the last drop of economic blood was squeezed out of his business. Yes, I think a great freedom rode on that case.

Personally, I don't think Congress can pass a law that requires a private company or individual who once engages in a business that affects interstate commerce, to stay in that business forever. And that was what the Supreme Court affirmed. So I think it was an important case.

Senator BAYH. Justice Haynsworth, you may or may not concur in the opinion of our distinguished colleague from North Carolina. He was involved in that case. He certainly has a full awareness of many of the aspects, and has developed, as is usually the case, some rather tenacious arguments in support of his position.

Senator ERVIN. And my position was sustained by the Supreme Court completely. I didn't have anything to do with the other points of the case.

Senator BAYH. Well, I think there is some question about whether the Supreme Court did sustain the Senator's position or not.

I am not fully——

Senator ERVIN. Well, there is no question at all about it, none, because they held a businessman could go out of business completely and permanently for any reason satisfactory to himself, including the advent of a union.

If the Court hadn't held that, there wouldn't have been much freedom left in this land.

Senator BAYH. Do you have any comment on that?

Judge HAYNSWORTH. Senator, I can say that as far as I am concerned, the Supreme Court said that the majority was correct on the record that we had. And as far as any difference with the Supreme Court is concerned, that's all I can say.

As far as the importance of the case, Senator, cases are more or less important, I suppose, depending upon a variety of viewpoints. But from my point of view as a judge, and my colleague's share the same point of view, every case is important. And we devote ourselves to try to come out with what we think is the right conclusion.

We don't take a look at cases as if one is more important and we are going to spend a lot of time on this one and that one doesn't amount to anything. We treat every one as being important.

Senator BAYH. I appreciate that fact.

I want to lay to rest once and for all, or find out if there is any fire to sustain some of the smoke that has been floating around your nomination, relative to the relationship that you and your law firm have with the textile industry.

Judge HAYNSWORTH. Yes, sir.

Senator BAYH. The clientele that your firm has had, and the significant character of this case, has created the controversy. And when we get back to the ethical question, I want you to be prepared fully to expound whether in your judgment there was any conflict of interest there.

Now, when did you leave the law firm?

Judge HAYNSWORTH. In 1957, when I was appointed to the court.

Senator BAYH. You severed all connection with the firm at that time, as I recall the testimony yesterday.

Judge HAYNSWORTH. Oh, yes, completely.

Senator BAYH. As I recall, yesterday you said you did not receive any income from the law firm after going to the bench.

Judge HAYNSWORTH. When we agreed upon my interest in uncollected fees and things of that sort, the law firm did not have the cash to pay in cash then and we agreed that they would pay it over the next 2 years.

Senator BAYH. Well, that is a reasonable thing.

Judge HAYNSWORTH. Yes.

Senator BAYH. I mean, this isn't the kind of continuing interest that would be subject to criticism.

Judge HAYNSWORTH. No. My interest was appraised as of the day I left and they paid me that, and that was all.

Senator BAYH. Did you have any jointly owned property, or any continuing relationship, with new members of the firm carried on after going to the bench?

Judge HAYNSWORTH. No, with the exception, of course, of my stock interest in a——

Senator BAYH. Carolina.

Judge HAYNSWORTH (continuing). Vending concern and with two other little small pieces of real estate which I referred to in my financial statement, too. This was a firm of several individuals who——

Senator BAYH. I notice that Law Buildings, Inc. apparently was the owner of the property held by the law firm.

Judge HAYNSWORTH. Yes, that is correct.

Senator BAYH. I understand that you have severed all ownership in that corporation now.

Judge HAYNSWORTH. Yes, sir. They bought my interest in that.

Senator BAYH. Did they do that at the same time——

Judge HAYNSWORTH. As of the time I left, yes.

Senator BAYH. Have any members of your family any relationship to the law firm or received any profits from the law firm since you have gone on the bench?

Judge HAYNSWORTH. I have a young cousin who is a member of that firm now. He was not there when I left it. But a young cousin of mine is, recently became a partner in that law firm.

Senator BAYH. Now, is this any special relationship, or is he just working like the other lawyers and getting fees——

Judge HAYNSWORTH. He went there as a clerk, just as every other clerk, and has moved up until now he is a partner.

Senator BAYH. Now, let's leave that business of the law firm for a moment and go to Carolina Vend-A-Matic Co.

I notice that the Chairman pointed out that you had taken a real skinning in selling your stock, losing a million dollars by getting out right away. In light of all the controversy, you might say right now it wasn't worth that $450,000 you got out of it. But that's neither here nor there.

Could you tell us, for the record, what type of business it was and the way in which the machines were installed?

As I recall, the total capitalization of the company was $30,000.

Judge HAYNSWORTH. Authorized capital.

Senator BAYH. Yes, authorized capitalization. And that there was $12,700 of that put in.

Judge HAYNSWORTH. I believe that is correct, sir.

Senator BAYH. Well, if that isn't, we will amend it.

And that your capital there was about $1,800?

Judge HAYNSWORTH. No. I paid in $3,000.

Senator BAYH. $3,000? Where did I get $1,800? I am sorry.

Now, as I recall from yesterday, that was about a seventh interest or was exactly one-seventh?

Judge HAYNSWORTH. Yes. If you disregard one share, it was one-seventh, approximately one-seventh.

Senator BAYH. Right. You mentioned yesterday that there were additional loans that had been agreed upon and that you were a signatory to those loans. Yesterday you weren't quite certain what the amounts were. Have you had a chance to give the committee the benefit of just how much additional capitalization you were involved in, in which you were obligated in addition to the $3,000?

Judge HAYNSWORTH. No, I haven't attempted to check that, sir. I know when the two initial stockholders were through, out of concern because of their exposure, they began to get concerned when the amount of the endorsed loans passed $50,000. It kept on going up. Ultimately, checking from the financial statements that were entered in the record, though I do not have them now——

Senator BAYH. We don't need to pursue it because you haven't tried to hide that at all, and I am sure if any member of the committee wants to get it, they can.

Do you remember, specifically, who those funds were borrowed from, inasmuch as you did say yesterday that was part of the business you were directing?

Judge HAYNSWORTH. Generally, endorsed loans were obtained from the South Carolina National Bank.

Senator BAYH. I noticed, although I am not sure this has any direct relevancy, but I am intrigued by looking at the chart of the corporation, which indicates the original charter had a $30,000 value, and then on April 8, 1964, the capital stock value was decreased $12,700. Is there any significance to this at all in the corporate finances, any need to explain that or any reason behind it?

Judge HAYNSWORTH. This was—I had no active part in this at the time, but I understand some lawyer of ARA wanted the authorized stock reduced to the amount that was then outstanding.

Senator BAYH. This was prior to——

Judge HAYNSWORTH. Why he wished it I don't know.

Senator BAYH. This was prior to ARA assuming full ownership?

Judge HAYNSWORTH. This was done in connection with the stock exchange, and why he wanted that that way I don't know because I was not a part of it, but it was done as a part of the stock exchange.

Senator BAYH. Now, I think just to make the record complete, you pretty well documented yesterday, very forthrightly, the original officers and directors of the company that was incorporated back in 1950 and that one, two, three, four, including yourself, were members of your law firm. Now, is that——

Judge HAYNSWORTH. At the outset; yes, sir.

Senator BAYH. Yes.

Judge HAYNSWORTH. Four of the original five and two of the later seven were members of my law firm.

Senator BAYH. Now, I suppose when you got into this business you had some particular reasons for expecting that the vending machine company was going to succeed, or you wouldn't have invested your money. And it did fantastically well. Do you have any recollection about when that success began? I notice a fellow by the name of Dennis, that you referred to, was hired. Is there any special meaning to his being hired?

Judge HAYNSWORTH. Well, the man we had at the outset, Mullens, did very well with it at the outset, and it grew to the point where he felt that it was beyond him, that he needed someone to take charge and let him work under his direction. It began with that. And we got Dennis in. Mullens stayed on.

Senator BAYH. Dennis was hired in what, 1957?

Judge HAYNSWORTH. Yes, sir; I believe that is correct.

Senator BAYH. Had he been, as I recall, he had been with Judson Mills as a personnel manager——

Judge HAYNSWORTH. I think that is true.

Senator BAYH (continuing). Or production manager, and then came with your corporation.

Judge HAYNSWORTH. That's right.

Senator BAYH. With Vend-A-Matic.

Well, now, there has been some insinuation that Dennis used this relationship, in one way or another, to get contracts for Carolina Vend-A-Matic from Deering Milliken.

Judge HAYNSWORTH. Well, I don't think he did. The record proves that if he tried, he was not very successful. He came from Judson Mills and we had coffee machines in that mill. But we had to remove them in 1958. And I don't know that he had any connections with other plants. But certainly after that he was in contact with other textile plants, other employers, all over, submitted bids each time he had a chance to.

Senator BAYH. He did. He was successful in procuring the two contracts we discussed yesterday, which have been a matter of record, I think.

Judge HAYNSWORTH. One new one, really, Magnolia. Gayley Mill we have been in since 1952. The service there was expanded in 1958, but this was an expansion of the service that dated back to 1952.

Senator BAYH. Dennis had a part ownership of Carolina Vend-A-Matic. He was made an equal partner.

Judge HAYNSWORTH. Yes.

Senator BAYH. He was aware—was he or was he not—that you were then listed as the vice president and director?

Judge HAYNSWORTH. Oh, yes.

Senator BAYH. Was he told not to disclose this to any of the other clientele that he was dealing with in procuring business?

Judge HAYNSWORTH. Yes; he was.

Senator BAYH. Do we have that listed any place in the record where we can nail that down once and for all, a board of directors' meeting or——

Judge HAYNSWORTH. No, sir. I don't think so. Not only he but the remaining stockholders do, too.

Senator BAYH. Now, I want to repeat what we have had put in the record here, to keep to this line of questioning.

Those companies that were Milliken-oriented, relating to this telegram that the chairman put in, produced about a hundred thousand dollars worth of business.

Judge HAYNSWORTH. Yes, sir.

Senator BAYH. Three percent—did we agree on that figure from the computer, Mr. Chairman? Have we got that answered yet?

Senator MCCLELLAN. My recollection is 3.1 percent of the total gross income. Is that right?

Judge HAYNSWORTH. Yes; I think that is correct.

Senator MCCLELLAN. About 3.1 percent of the total income. I think that is what you said yesterday. The record will establish it.

Senator BAYH. All right; so much for Deering Milliken.

I notice from looking at the information you have supplied that the clientele of Carolina Vend-A-Matic is mainly textile mills.

Judge HAYNSWORTH. Well, it served—what is there is a list of full food vending services in industrial plants.

Senator BAYH. Let me just go down the list here.

Judge HAYNSWORTH. And I suggest this is a pretty good cross section of the industrial plants in that area.

Senator BAYH. Let me go down the list here and you tell me whether we are right or wrong.

Judge HAYNSWORTH. All right, sir.

Senator BAYH. I don't know how you pronounce this—Apalache. Is that the way you pronounce it?

Judge HAYNSWORTH. Apalache Plant.

Senator BAYH. Apalache Plant.

Judge HAYNSWORTH. Textile plant. It is a textile plant.

Senator BAYH. Is it true that that is owned by J. P. Stevens?

Judge HAYNSWORTH. It is.

Senator BAYH. Bloomsburg Mill of Abbeville. That's Bloomsburg Mill of Bloomsburg, Pa.?

Judge HAYNSWORTH. I don't know what it is, sir.

Senator BAYH. Carlisle Finishing Co., Union. That's a part of Cone Mills?

Judge HAYNSWORTH. Yes, it is.

Senator BAYH. Central Mill in Central is part of Cannon Mills?

Judge HAYNSWORTH. I don't know, sir.

Senator BAYH. Delta Finishing Co. is J. P. Stevens?

Judge HAYNSWORTH. J. P. Stevens; yes, sir.

Senator BAYH. And Diehl Manufacturing Co. is part of Singer Sewing.

Judge HAYNSWORTH. As far as I know, it is not in the textile business. This was an electric—I believe they made electric motors.

Senator BAYH. I am sorry.

Judge HAYNSWORTH. Nothing in connection with textiles.

Senator BAYH. I want to clarify it. If they are not, I want to know it. The Firth Carpet Co. in Laurens, S.C.?

Judge HAYNSWORTH. It is textiles, I assume, from its name.

Senator BAYH. Mohasco Industries.

Fort Shoals Mill, Fort Shoals, Regal Textile Corp.

Judge HAYNSWORTH. I believe that is correct.

Senator BAYH. F. W. Poe Manufacturing Co., Greenville, Burlington Industries?

Judge HAYNSWORTH. That is correct.

Senator BAYH. Gayley Mill, Marietta, Deering Milliken. We have heard that one before; haven't we?

Judge HAYNSWORTH. Yes.

Senator BAYH. Greer Mill of Greer, another J. P. Stevens?

Judge HAYNSWORTH. That is correct.

Senator BAYH. Homelite, Greer, Textron Corp.?

Judge HAYNSWORTH. No, sir. They make chain saws.

Senator BAYH. Chain saws? I don't see how you get that into the textile business.

Judge HAYNSWORTH. No, sir.

Senator BAYH. Thank you. We would like to believe that was a subsidiary which was in the textile business, but you say that outfit——

Judge HAYNSWORTH. All I know is they make——
Senator BAYH. Chain saws.
Judge HAYNSWORTH. Chain saws.
Senator BAYH. Thank you.
James Fabrics, part of Burlington Industries?
Judge HAYNSWORTH. I don't know, sir.
Senator BAYH. Jeffrey Manufacturing Co., part of Jeffrey Manufacturing Co. of Ohio. Now, we have been told that there has a connection with the textile industry. Do you know whether that is correct or not?
Judge HAYNSWORTH. This plant is not in textiles, but I don't know what connections they might have.
Senator BAYH. Jonesville Mills. Of course, Jones Mills is J. P. Stevens.
Judge HAYNSWORTH. I believe that is right.
Senator BAYH. Magnolia Finishing Plant. We have heard of that one before.
Deering Milliken.
Judge HAYNSWORTH. Yes.
Senator BAYH. Monaghan Mill, Greenville, another J. P. Stevens?
Judge HAYNSWORTH. That is correct.
Senator BAYH. Mohasco Industries, a subsidiary of Mohasco Carpet Co.
Judge HAYNSWORTH. Yes.
Senator BAYH. Morgan Mills, the same?
Judge HAYNSWORTH. I don't know.
Senator BAYH. All right. That's our information. If that is erroneous, I hope someone will come forward and tell us.
Owens-Corning Fiberglas. Is that out in the textile business down there?
Judge HAYNSWORTH. Glass fibers, they produce that. Some one may classify it as that, but it goes into boats and things like that.
Senator BAYH. Pickens Mill, is that part of the Mayfair Mills chain?
Judge HAYNSWORTH. Yes, sir.
Senator BAYH. Pratt Reed, is that part of the textile industry?
Judge HAYNSWORTH. It makes metal goods that I think are sold to the textile industry. I think it is a supplier to the textile industry.
Senator BAYH. I will skip over that Pyle National of Aiken.
Judge HAYNSWORTH. Procter & Gamble.
Senator BAYH. Procter & Gamble. I just skipped over that automatically. I went down to the next one, which I was not at all familiar with. Is that related to the textile industry.
Judge HAYNSWORTH. Not as far as I know.
Senator BAYH. I have no information on that.
Rocky River Mill, is that part of Bigelow Carpet?
Judge HAYNSWORTH. Senator, I believe it is, but I am not certain.
Senator BAYH. Selma Hosiery, is that a subsidiary of Burlington Mills?
Judge HAYNSWORTH. I don't know, but from its name I would assume it is in the hosiery business.
Senator BAYH. Without pursuing all of these others, I note we have been informed that Union Bleachery is part of Cones Mill, is that——

Judge HAYNSWORTH. I think that is correct.
Senator BAYH. Victor Mills
Judge HAYNSWORTH. J. P. Stevens.
Senator BAYH. J. P. Stevens. And Woodside Mill.
Judge HAYNSWORTH. Dan River.
Senator BAYH. Dan River.
Judge HAYNSWORTH. As you have just suggested, you have skipped a number that are clearly not in textiles.
Senator BAYH. Well, let's put them in there. There probably aren't many. Are there more than 10?
Judge HAYNSWORTH. Senator, I haven't counted them but I will be glad to.
Senator BAYH. Well, let's do that because I don't want to misinterpret this at all.
Judge HAYNSWORTH. No. 7 I assume is not, Columbia Nitrogen.
Senator BAYH. I have no idea what——
Judge HAYNSWORTH. Diehl is not.
That's two.
Senator BAYH. Consolidated Trim, is that?
Judge HAYNSWORTH. I don't know.
Homelite is not. Jeffrey is not.
Some of these, of course, I don't know. Owens-Corning I wouldn't say was in textiles because it produces glass fibers.
Senator BAYH. Of course, we could argue that one way or the other.
Judge HAYNSWORTH. Yes, sir.
Senator BAYH. But I am willing to say that that isn't because they make all sorts of different things.
Judge HAYNSWORTH. Pratt Reed I would say is not. Proctor and Gamble is not.
Senator BAYH. That's for sure.
Judge HAYNSWORTH. Sangamo Electrical, two, plants. Neither one is. S.C.M. is not. These are typewriters. Shuron Optical is not. Torrington, two plants, is not. They make bearings.
Senator BAYH. What does Torrington make?
Judge HAYNSWORTH. Bearings, I think.
Senator BAYH. Bearings?
Judge HAYNSWORTH. One of them is said to be the bearing division.
Senator BAYH. That's right. And one—the one in Clinton.
Judge HAYNSWORTH. Those are the ones I can recognize as not being textiles.
Senator BAYH. That's 12 out of 46 that we recognize as not being related to textiles. And I will be willing to concede that maybe a few others—there may be a few others in there, but we ran down a significant list that were obviously oriented to textiles in which Carolina Vend-A-Matic has an interest.
Judge HAYNSWORTH. I suggest it is probably a fair cross section of the industry in the area.
Senator BAYH. May I ask again: When did you become vice president of Carolina Vend-A-Matic?
Judge HAYNSWORTH. Sir, I think almost at the outset.
Senator BAYH. Right at the beginning. You were a director at the same time?

Judge HAYNSWORTH. We were all given some title.

Senator BAYH. Is it accurate to say that there were just several vice presidents and the first vice president wasn't more important than the second or third vice president?

Judge HAYNSWORTH. No, sir. And I never was listed first, second, third, or fourth.

Senator BAYH. Now, again, let's touch on this matter because I would like to get it clarified. When did you, in fact, resign as vice president?

That's been a matter of some consternation here to some people. You did resign when? Was it after the order of the Judicial Conference and the setting of standards?

Judge HAYNSWORTH. As a director, yes, sir.

Senator BAYH. Now, it was about that same time, wasn't it? Yet, as I recall, you were carried until 1964.

Judge HAYNSWORTH. As what?

Senator BAYH. As vice president.

Judge HAYNSWORTH. Senator, I don't think this is a matter of importance because I did nothing in that office. The record, of course, is not entirely consistent with my recollection and that of some of the other stockholders. My recollection is that I resigned when I went on the court in 1957, but the minutes for the next year and the years after that show my being reelected as vice president each year until 1964.

Senator BAYH. I think you can understand why even a friendly sponsor might have some concern about your recollection of a 1957 oral conversation to termination and then, at regular annual intervals, the board of directors' minutes show that you are listed as a vice president and director.

Now, I think that is a reasonable concern.

Judge HAYNSWORTH. Well, I don't question your right to be concerned, but I think there is no—I see no basis for concern at all in the way this concern was handled. We met at lunch. We were informal. I explained yesterday afternoon what we did when our annual meetings came on was somebody would propose to reelect the same officials, it would be passed, and somebody would carry it out, and in typing it up in detail apparently went to the minutes of the last year's meeting, and this is the way I think it happened, though I am not certain. I am speculating.

I know we met, what we did, and the very informal way in which it was handled. So I would think this need not be an inconsistency. But in any event, if my recollection and that of my fellow stockholders was wrong about my informal resignation in 1957, that's what I think I did, that's what they think I did.

But you accept the record. I don't think it has any effect upon the inquiry because I did not have any active duty in that office.

Senator BAYH. I think it is fair to say, although it is probably not appropriate here, whoever was handling the records of the unofficial business certainly didn't do you a favor by continuing to list you in that capacity after the oral statements.

Judge HAYNSWORTH. Well, I don't think it reflects upon me.

Senator BAYH. No. I think it certainly has been a source of some embarrassment to you, to say the least.

Judge HAYNSWORTH. Not in the least.

Senator BAYH. Not in the least? Very fine.

When did your wife become secretary?

Judge HAYNSWORTH. In 1962, January.

Senator BAYH. Now, as I recall, yesterday you said that she had done routine procedures in her capacity as secretary.

Judge HAYNSWORTH. Yes.

Senator BAYH. This makes it very difficult now because in the routine office procedure she was the secretary, and yet neither of you were apparently aware of the fact that those records, that supposedly were in control of the secretary, listed you as a vice president, director.

Now, I am willing to accept your statement that you were a director and vice president and that this didn't mean you had a great deal of interest in the corporation. But it is most unfortunate that we have had this inconsistency which tends to cloud the whole picture.

Judge HAYNSWORTH. Senator, I don't know what I can say. My wife was concerned about a widow whom we knew who was left with no information whatever about business affairs and what went on in an office. She was intrigued by it. She wanted to know something about it. And she went out there two or three times a week and she did what she could to help in the office. This is a natural thing, and even in 1962 she was paid something for what she did.

Senator BAYH. What sort of salary did she get?

Judge HAYNSWORTH. She got for the year, I believe it was $1,500. In 1963 she stopped doing that. She didn't get paid anything. In 1964, someone else was elected, of course, and she had no more official connection with it. But in 1962, she was going out to the office and doing what she could to help in the office, not every day but two or three times a week.

As far as the minutes are concerned, I am sure she signed what was prepared and what was handed to her, and she did sign the minutes in 1962 and 1963.

Senator BAYH. Now, it has been disclosed, I think you disclosed it yourself, that there was a profit-sharing and pension plan that was——

Judge HAYNSWORTH. Yes, sir.

Senator BAYH (continuing). Organized by the corporation, and you had, as I recall, capacity as a trustee.

Judge HAYNSWORTH. I was one of three trustees, I believe, in the pension fund.

Senator BAYH. That started in 1961, is that correct?

Judge HAYNSWORTH. I believe so.

Senator BAYH. It is not important.

What type of plan is it? Was this a plan to cover all those who were employed, or was this to have more limited accessibility to just executives, or was it for everybody?

Judge HAYNSWORTH. Oh, no; principally for the ordinary employees. It did not reach directors.

Senator BAYH. As I recall reading some place, I don't know whether it was Dun & Bradstreet or what it was, that there were about 140 employed by Carolina Vend-A-Matic at the time that you disposed of all your interest.

How many of these 140 were covered by the plan; do you have any idea?

Judge HAYNSWORTH. Senator, I don't; I wouldn't know that we had 140 employees. Without reviewing the plan, I would not, would not know what proportion of the employees that we had were in it. But I do know this was not a plan that reached the stockholders and directors as such. Dennis may have been in it.

Senator BAYH. Did this plan envision accumulation of funds for later disbursement or did it distribute profits regularly?

Judge HAYNSWORTH. On retirement.

Senator BAYH. I am sorry?

Judge HAYNSWORTH. On retirement.

Senator BAYH. Sir?

Judge HAYNSWORTH. To provide income——

Senator BAYH. On retirement?

Judge HAYNSWORTH. Right, sir.

Senator BAYH. So this was really a retirement plan.

Judge HAYNSWORTH. Yes.

Senator BAYH. The profit-sharing part was to be distributed on retirement.

Now, you mentioned that this didn't reach the directors. Did you or your wife or any of the other officers of the profit-sharing——

Judge HAYNSWORTH. Had no interest in it.

Senator BAYH. Had no interest?

Judge HAYNSWORTH. No, sir.

Senator BAYH. You didn't?

Judge HAYNSWORTH. No, sir.

Senator BAYH. You don't?

Judge HAYNSWORTH. No, sir.

Senator BAYH. Your wife doesn't?

Judge HAYNSWORTH. No, sir.

Senator BAYH. Didn't?

Judge HAYNSWORTH. Didn't and doesn't.

Senator BAYH. Fine. But you did have this trustee relationship, which, as I recall in reading the articles of incorporation of that trust, gave to the trustees a life-and-death power for determining what and how investments would be made for the fund.

Judge HAYNSWORTH. Yes. We had the right to invest the funds and keep them invested, the usual right of—that the usual rights that trustees of such a fund have.

Senator BAYH. And the trustees administered the funds?

Judge HAYNSWORTH. Yes, sir. Of course, this didn't—this was so shortlived that we, as I recall, we never got into problems of disbursements.

Senator BAYH. Do you still have a trustee relationship?

Judge HAYNSWORTH. Oh, no, sir.

Senator BAYH. Well, you know, sometimes these pension funds, retirement funds and profit-sharing funds that accumulate money have a vested interest that is held even after the closing of the corporation that originally founded it. That is why I am asking the question. I am not at all trying to embarrass you. If the answer is no, then the answer is no, and that's fine.

Judge HAYNSWORTH. Well, I know what you say is true, but——

Senator BAYH. Well, no, there are some people saying: you know, the judge has an interest in that retirement fund——

Judge HAYNSWORTH. I do not.

Senator BAYH. Even though the company was sold, the retirement fund is the kind of fund that goes on until retirement. Now, you say you don't have such a relationship.

Judge HAYNSWORTH. Senator, I think this fund was taken over by ARA and integrated with its own plan. I don't know what happened to it afterward, but the end of my trusteeship was in 1964.

Senator BAYH. You are no longer a trustee? You do not, and have not had any interest in it?

Judge HAYNSWORTH. I have had nothing to do with it since then, sir.

Senator BAYH. Well, I appreciate that fact very much, and I think that certainly goes to one of the matters that has been expressed.

I think that pretty well covers all of the questions I wanted to ask you on the matter of Carolina Vend-A-Matic. Now, let me ask you to explore this whole business of canons of ethics and conflict of interest.

As I said earlier, I think that this has been a unique case because in my judgment this is the first time in the history of the Supreme Court of the United States that we are asked to fill a vacancy that was caused by a retirement of one of the Supreme Court Justices because of some question about ethical conduct.

I think it is only normal that this committee would be particularly concerned about ethical conduct. I hope the committee will go further and set criteria for all prospective Supreme Court Justices.

Now, as I recall from the questioning yesterday, Senator Tydings brought out some testimony that you had made before his subcommittee. I quote from the transcript:

> Of course, when I went on the bench I resigned from all such business associations I had, directorships and things of that sort. The only one I retained is the trusteeship of this small foundation which I mentioned in my main statement, and I think that perhaps the best rule for a judge to go by now is stop doing even that much.

Now, this was a mistake; was it not?

Judge HAYNSWORTH. Well, yes; to the extent that I said that I resigned from them all when I first went on the bench it was. It was correct at the time I appeared. At the time I appeared I had no directorships whatever.

Senator BAYH. Well, could you give us, please—well, first let me just continue this line of questioning about the canons of ethics. Then I would like to have your opinion about what practice you should follow and have followed and, most important, will follow.

There may or may not have been improprieties in the past. I am not prejudging that at this particular time. If there were, there is nothing we can do about that. I want to know what will happen if you are sitting on the Supreme Court.

In the canons let me quote—and I am sure you have heard these so many times that you can probably say them in your sleep—No. 13:

A judge should not act in any controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

26:

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the courts; and, after his accession to the bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

And 29:

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Now, there is 24 talking about inconsistent obligations and 25 talking about business promotions and solicitations for charity. There is no need of bothering you further with this.

But what is the general practice Supreme Court Justice Haynsworth will follow in the business of conflict of interest—in ethical conduct?

Let me phrase it that way, please.

Judge HAYNSWORTH. Well, Senator, I can tell you what I have done as a circuit judge. I have attempted not only to comply with them but with their spirit completely. I have not sat on any case in which my former law firm was involved. I have not sat on any case in which a law firm in which a young cousin of mine is involved.

I have had no occasion to step aside because I was involved in any case because I was not involved in one and none of my close relations have been—close relationships have been involved. But the only context in which it has come up is in connection with where my former law firm has been involved or a law firm in which a young cousin of mine is a young partner, and I have not sat on those.

I have attempted in my personal relations to be friendly with members of the bar, and I am. I have not had any close intimate relationship with any group, particular group of lawyers. I have not done anything to create the impression that I was on one side of any general area of controversy. And I suggest to you that I have not made or retained any investment in any concern which was likely to be involved with frequency in my court. To the extent one's own stock in a national concern may become involved in a case in my court, I have not sat except insofar as indicated by the written statement. But I don't recall instances in which I have.

But one judge in my court, with agreement with the rest of the court, has sat in cases here he has had a very minor stock interest, after the lawyers had been informed and given a chance to say whether they wished or that they would prefer he not sit.

Senator BAYH. I want to go back to my original statement that I am not suggesting that you have done anything illegal. I am expressing a bit of concern about the way this looks.

And this is—the aura of fairness—has to be preserved.

Judge HAYNSWORTH. By this you mean my relation with this vending concern?

Senator BAYH. Well, I want to deal with that in a minute, but you brought up the interest that you owned—I suppose you were referring to the 550 shares in J.P. Stevens. Now, if there is any textile company that is going to be sued and involved in litigation, it is J. P. Stevens. I don't know if it is good or bad, but I can read the record, and they are right in the middle of this controversy as far as litigation is concerned.

I understand that on two occasions you have removed yourself from the case in question.

But don't you think if you are really going to go forth with the type of reputation that is necessary, that you need to look at Canon 26, which states that a judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court?

Judge HAYNSWORTH. Yes, sir.

Senator BAYH. Now, doesn't J. P. Stevens fit into that?

Judge HAYNSWORTH. Well, Senator, I think what this is designed to reach——

Senator BAYH. I say, please, in all fairness—excuse me for interrupting—if you are sitting on that court, just what are the chances that a J. P. Stevens case is coming? You can see it, and it is going to be there.

Now, it seems to me that this kind of ownership is asking for trouble.

Now, excuse me for interrupting.

Judge HAYNSWORTH. The provision, I think, is designed to reach the situation of a trial judge, for instance, who has frequent suits against a bus company and he should not be a stockholder in a business concern because it is up there with frequency. But when I went to the court in 1957, I had no reason to believe that J. P. Stevens would be frequently in my court. Indeed, it had not been frequently in my court. It has been there twice, I believe, maybe three times, in connection with labor relations cases.

Senator BAYH. Judge Haynsworth, sir, please, we are not talking——

The CHAIRMAN. Let him answer.

Senator BAYH. All right.

Judge HAYNSWORTH. And in each of those instances I had no reason to foresee that these would arise. But I suggest to you if my very small stock interest in J. P. Stevens gives me a reason to stand aside and have nothing to do with the cases when they did come up, if I divested myself of that, I had no legal reason not to sit on the case, I would still be much concerned because while I never had anything to do the Stevens' labor relations affairs, they were a very close client to me. And I would not sit, wish to sit, on a case in which they were involved, whether I owned stock or not.

Now, it is easy enough to say I could have sold the stock, but that really doesn't solve the problem, as far as I am concerned. I would prefer not to sit on any case they had, whether I owned stock or didn't. And, of course, I haven't. And the fact I owned this stock while the outcome was pending in my courts, as far as my stock interest, it was

nothing to me in the world. My stock interest was 500 shares, something of that sort. The impact of any decision in my court would be, I won't think you could compute it. It wouldn't amount to anything. And that's not the reason that I shouldn't sit, really, though it is a legal reason why I should not, and I have not.

Senator BAYH. Past legal relationship rather than the present financial ownership?

Judge HAYNSWORTH. Well——

Senator BAYH. It seems to me you are asking for trouble on something like that.

Judge HAYNSWORTH. There is no reason in the world, Senator, that I know of, that a judge cannot sit on a case involving some client he at one time represented, or his firm did. But when you get to having close relationships over an extended period of time, at least I would very much prefer not to.

Senator BAYH. Well, I certainly see no reason why your judgment should be the same as mine. That is not the reason for asking the question. But it seems to me that when you suggest that your 550 shares in J. P. Stevens is not overly significant, that we are dealing with something right on point in canon 26, but you disagree.

Judge HAYNSWORTH. I don't disagree at all. I said that I had not sat. I don't think I should sit. I just suggest with the stock ownership why I should not sit.

Senator BAYH. Fine. I was trying to see if it wouldn't be more important, as far as the canons of ethics are concerned. I can see that you are more concerned about legal relationship.

Judge HAYNSWORTH. If I sold the stock I would still have a problem: What should I do when a case came up?

Senator BAYH. In the Deering Milliken case, the Darlington case, Judson Mill, which was a former client, was part of the Milliken complex. Did you consider removing yourself from that case because of the past relationships with your law firm?

Judge HAYNSWORTH. Milliken, itself, I never represented. Judson Mills, which was in the complex—and if you read the opinions of the court it is a rather complex thing because individuals and groups owned stock in concerns which in turn controlled more. I don't know what the degree of control was or how it was, but somehow I understand Judson Mills was controlled by Milliken. And we had represented them in the past, and after they acquired them we represented them to the extent of handling purely local matters requiring attention of local people. We did not handle their general work, which was handled by Milliken lawyers, whoever they were.

Senator BAYH. You didn't feel that your past relationship with Judson and with Milliken was significant enough that when the Leesona Corp. case came up in 1962 and 1963, involving Judson and Milliken, you should disqualify yourself from the case?

Judge HAYNSWORTH. The relation was as casual as it could be. And as I said, I never was the lawyer for Milliken.

Senator BAYH. But is it not true that clear back to the beginning of the law firm, Judson Mills was a Haynsworth client?

Judge HAYNSWORTH. This is true.

Senator BAYH. Yet you did go ahead and sit on the Leesona-Judson Mills——

Judge HAYNSWORTH. The real party in interest in that case, of course, was Milliken, not Judson. But even if Judson had been—there was no reason in past relations I had with Judson Mills for me not to sit on that case.

Senator BAYH. Excuse me. Let's put the record straight, then. Please put into the record why a case that is listed as *Leesona Corp.* v. *Cotwol Manufacturing Co.*, Judson Mills, division of Deering Milliken Research Corp. isn't regarding Judson Mills?

Judge HAYNSWORTH. Well, it is. This was a patent case. The patentee was Milliken Research, as I recall. The machine was in Judson. But usually in those cases the patentee is the real party in interest.

Senator BAYH. I have a list of cases here that have come before you in which your law firm at one time or another has represented one of the parties. Why don't I just toss them out here and you shoot them down.

Judge HAYNSWORTH. All right, sir.

Senator BAYH. Tell us why you felt that there was no impropriety in your sitting, and we will just get it out of the way.

St. Paul Mercury Insurance Co. case, which I understand your law firm had represented.

Senator HRUSKA. Would the Senator yield?

Senator BAYH. I would be glad to.

Senator HRUSKA. There is reference to the nominee's law firm. Perhaps that should be qualified a little bit: It is the successor of the law firm of which at one time the Judge was a member. Isn't that true?

Is it contended by the Senator that he was a member of the law firm that represented St. Paul Mercury at the time he sat on the case?

Senator BAYH. Not whatsoever. The *J. P. Stevens* case came before the court and Judge Haynsworth disqualified himself, although he is not a member of the law firm.

Senator Hruska, I would like to get this out in the open. This *St. Paul Mercury* case, as I look at the timing, you had been with the law firm when that litigation started. But I make no allegations at all that you got any benefit from the law firm. I am dealing with this ethical question of when is——

Senator HRUSKA. When was the case tried?

Senator BAYH. 1957.

Senator HRUSKA. And had it been pending in his law firm when he was a member of the law firm?

Senator BAYH. It is my understanding it had. It has been alleged that it had. If that is correct, then I want to know it. And even if it had, it may be that the relationship there is too insignificant to be a critical problem.

Judge HAYNSWORTH. Senator, I don't know the case to which you refer. I don't recall it, but I am sure it was not a cause pending in my own law firm or handled by my law firm because I haven't sat on any cases in which my law firm was interested.

Senator BAYH. I am not aware—I think it probably would be incorrect to make the inference that the law firm did represent that client. I would not make that inference. I am trying to see if there is some relationship between your responsibility or a judge's responsibility to disqualify himself when past relationships arise.

Judge HAYNSWORTH. Well, let's set out—I mean my relations were past only, because I had no interest in the law firm after going on the court in 1957. But I have not thought and I don't think, I don't think it should be thought that I should not sit on cases in which casual clients of my former law firm might be involved. And I assume if you say my law firm represented St. Paul, that we did, but it was not a client that was very close to me. I owned no stock in it. I had no interest in the outcome.

Senator BAYH. I have taken the liberty of going through the Martindale Hubbell records and finding those companies or corporations, those businesses that are listed in Martindale Hubbell as being represented by your former law firm, and comparing that with the several cases that appeared before you, and I am willing to accept your judgment that there was not a sufficiently close relationship.

Judge HAYNSWORTH. Yes.

Senator BAYH. And there is no need of proceeding further on a case-by-case basis, because I am willing to accept your judgment as far as the first relationship is concerned, and I'm sure that the same relationship would exist in the others.

Now, you have been quoted, and I wonder if it is accurate, that if you had that *Darlington-Deering Milliken* case to do over again, that you would still sit, that you would still feel that you did not have a sufficient conflict of interest.

Judge HAYNSWORTH. Even if I knew at the time all that I know about it now, I would feel compelled to sit. A duty, a judge has a duty, I feel, to sit unless there is a legal reason for his not sitting. And this can achieve a major importance in a case being heard en banc. Even when it is not heard en banc, if a judge seeks to avoid sitting on a case in which there is no legal reason for him not to sit, it means the Chief Judge—and that's me—must rearrange the schedule with a departure from the random selection of panels because you can't change one case without changing something else and you can't change one panel without changing something else. And to protect the random selection of panels so that every litigant in the court, so far as we can, can be assured that the outcome of the case will not depend on any prearranged selection of the judges that are to hear it, requires that all this be held at a very minimum. And we have sought to do that.

Senator BAYH. You would do it over again. I admire your tenacity. I am not sure I concur in the judgment, but then that's——

Judge HAYNSWORTH. It is not tenaciousness, sir. But it is a judge's duty to serve unless there is a legal reason that he shouldn't serve. And I may suggest that the judges in the Federal system have been a courageous group on the whole. They have sat on unpopular cases. They have sat on cases where many of them would have given anything in the world if they could have avoided it and where a lax rule would permit them to avoid sitting.

And I think judges like that should be encouraged and they should not be made to feel that they ought to be limited.

Senator BAYH. Did Darlington know you were on that——

Judge HAYNSWORTH. Sir?

Senator BAYH. Did Darlington know you were on the board at the time that case was held?

Judge HAYNSWORTH. On the board of the vending concern?

Senator BAYH. Vending concern.

Judge HAYNSWORTH. No, sir.

Senator BAYH. You mentioned yesterday that, as I recall, in response to Senator Tydings' question: When was the first time there was any public knowledge or awareness that you were an investor or stockholder in Carolina Vend-A-Matic?—your answer: "I don't think that became known until after this appointment. It became known to the people involved in the lawsuit, of course, in December 1963."

Now, either this is true or what you just said. There is a little conflict there.

Judge HAYNSWORTH. I don't understand, sir.

Senator COOK. Will the Senator yield?

Senator ERVIN. I submit, Mr. Chairman, he said it hadn't been publicly known until after he was appointed. But he said it became known to the people involved in the lawsuit back in 1963 when Miss Patricia Eames communicated to Judge Sobeloff, the chief judge of the fourth circuit, what turned out to be a totally unfounded rumor.

Senator COOK. I think this is in the record.

Senator BAYH. I think the allegations of bribery that were made to Judge Sobeloff have been proven adequately incorrect.

Senator ERVIN. Yes; and I think Attorney General Kennedy, who was a very brilliant person, had all of the facts before him at the time that he made the statement that the facts showed that the charge of bribery and the allegation of a conflict of interest were absolutely unfounded and he wrote a letter in which he said he had complete confidence in Judge Haynsworth.

Senator BAYH. And he based this——

Senator KENNEDY. Would the Senator yield?

Senator BAYH. Let me just pursue this one point. He based it on a letter of Judge Sobeloff. And in reading Judge Sobeloff's letter I have had no inclination to find, or no indication that the judge——

The CHAIRMAN. You better read it again.

Senator ERVIN. It's got all the facts.

The CHAIRMAN. It does raise a question, in fairness to this nominee.

Senator BAYH. I have read it, Mr. Chairman.

The CHAIRMAN. It does raise a question of conflict of interest.

Senator ERVIN. I have to say what Phillip said to the Ethiopians: "Understandeth what thou readeth."

Senator KENNEDY. Would the Senator yield?

Senator BAYH. Let me just pursue this one point.

Does the chairman find in the Sobeloff letter—and he has had a chance to study it a great deal more than I—the fact that Judge Haynsworth claimed a half million dollars in Vend-A-Matic?

The CHAIRMAN. I think the question of conflict of interest was raised in the Sobeloff letter, and I think it was raised in Miss Eames' letter. The letters are part of the record. They will speak for themselves.

Yes; I think that.

Senator KENNEDY. Will the Senator yield?

Senator BAYH. I yield.

Senator KENNEDY. I think we can clear it up. Mr. Duffner is here.

He is familiar with that case. I have had a chance to review the file on it, and it is certainly my impression from reviewing the file that the only question that was brought up to Judge Sobeloff, the basis of the allegation of Patricia Eames was a criminal violation, whether a criminal violation had occurred because of the alleged "throwing" of the contracts.

In reading——

The CHAIRMAN. I think the——

Senator KENNEDY. Would the Senator permit me to continue?

The CHAIRMAN. Excuse me.

Senator KENNEDY. Nowhere either in the allegation that was raised by Patricia Eames or in Judge Sobeloff's records or comments did they ever reach the question about the initial propriety of Judge Haynsworth sitting on that case. And if any of my distinguished colleagues can find that within the record, then I would like to hear that now, because I have not seen that. And we have Mr. Duffner here, who is from the Justice Department, who can respond.

We can look.

The matter that came to the Justice Department was sent to the Criminal Division, referred to the Criminal Division of the Justice Department for the investigation of any criminal liability. It did not come before the Attorney General on a preexisting conflict of interest.

Senator HRUSKA. Would the Senator yield?

The matter was referred to the Criminal Division, and properly so, because the text of 28 U.S.C. 455 has to do with that, and it requires a judge to disqualify himself in a case in which he has a substantial interest, and so forth.

However, Judge Sobeloff's letter clearly indicates in the first two paragraphs that he is treating as completely unfounded the charge of bribery or corruption in connection with the award of contracts. Then he proceeds for the balance of the several page letter to devote himself to the task of describing the stockholdings of the nominee, and the fact of his resignation from these boards of directors long before any court rule was established requiring that that be done.

He arrives at the general conclusion that the court, having all of these facts in reference upon which any possible conflict of interest could be based, has declared itself as having full confidence in Judge Haynsworth.

Now, I doubt very much that when the record of stock ownership and the membership on the board of directors and all of these other things are so plainly evident to the members of the court as well as to the Department of Justice, that the Department would say: "Wait a minute. We are not going to deal with anything but Miss Eames' charge that there was corruption and bribery."

When they take charge of a case for the purpose of determining the violation of a statute on conflict of interest because of a substantial interest in a case and a failure to disqualify they take charge of it for all purposes. To deny that would put the argument on the basis of a narrow legalistic proposition: A charge of bribery was made; it was dismissed; and that's all.

That's not true interpretation. And the full import of all of that record will clearly substantiate it. It was the basis of the memorandum

which the chairman and this Senator issued and which is in the record. That conclusion is based upon a full and complete and fair consideration of the record.

Senator ERVIN. And I would like to add——

Senator KENNEDY. We have——

The CHAIRMAN. Would the Senator yield?

Senator KENNEDY. Would the Senator yield? I think I still have——

The CHAIRMAN. I say, will you yield?

Senator KENNEDY. Well, I would just like to respond to this question.

The letter that the Senator from Nebraska refers to does not state what he alleges is a part of the record. It is two paragraphs long and I will read it at this time.

Dear Mr. Attorney General:

Enclosed is the file of correspondence passing between our court and counsel for the Textile Workers Union of America and Deering Milliken Corporation following the argument of an appeal in our court. Inasmuch as this relates to alleged conduct of one of our colleagues, we think it appropriate to pass the file on to the Department of Justice.

In that record—and I cease reading the letter from Mr. Sobeloff—or in that letter, there are the charges on page 3 from Patricia Eames of whether or not a criminal violation has occurred, and in reading through the record what was suggested based upon the anonymous phone call is that as a result of this decision, that the vending contract was thrown to Carolina Vend-A-Matic. And you just can't get away from that, and I will stand by this record:

We think it appropriate to pass the file on to the Department of Justice.

Happily, Miss Eames, who wrote the initial letter to the court on December 17, 1963, has herself acknowledged that the assertions and insinuations about Judge Haynesworth, made to her by some anonymous person in a telephone call, are without foundation; but I wish to add on behalf of the members of the court that our independent—

and once again the telephone call came on the basis of the "throwing" of the contract and it is all the way through this file—

are without foundation; but I wish to add on behalf of the members of the court that our independent investigation has convinced us that there is no warrant whatever for these assertions and insinuations, and we express our complete confidence in Judge Haynesworth.

The only point that we have raised both by Judge Sobeloff's letter, which is a part of the record, and is very clear and available to all of us—is that the question that was reached—and I think we have Mr. Duffner here who was in the Department of Justice at the time and can clear up this matter if there is any open question—that the question that was reached was about the criminal liability if the contract was "thrown." I don't see any place within the assertions by the Attorney General at that time that in any way it reached the question of the propriety or the ethical question about Judge Haynesworth's originally sitting on that case.

I don't believe that it was raised. And I don't believe that the question was reached.

Senator ERVIN. Will the Senator yield?

The CHAIRMAN. The Attorney General said that he had complete confidence in Judge Haynesworth. I do not believe that Attorney Gen-

eral Kennedy would have made such a statement had he thought there had been a conflict of interest.

Senator KENNEDY. Well, I read that same file and I am completely confident that there was no criminality involved in it, and I share Attorney General Kennedy's expression as well as Mr. Sobeloff's expression of complete confidence in Judge Haynesworth.

The CHAIRMAN. There was no criminality involved in it and no conflict of interest.

Senator KENNEDY. That's not—where does it say that?

Senator ERVIN. Well, I can tell you. If you yield to me, I will show you.

Senator KENNEDY. No, I am yielding to—I am asking——

The CHAIRMAN. That's the meaning of the letter the Attorney General wrote, and above it, above it in the file it had the initials.

Senator ERVIN. If the Senator will yield, I will show where the question was put.

The CHAIRMAN. All right.

Senator KENNEDY. If you stand up, does it help——

Senator ERVIN. I will tell the Senator from Massachusetts I always stand up, even when I am sitting down.

This whole investigation was set in motion by a letter of December 17, 1963, written by Miss Patricia Eames to Judge Sobeloff, the Chief Judge of the U.S. Court of Appeals. After setting forth this rumor which had been conveyed to her by an anonymous telephone call charging bribery, she wrote the three-page letter, and she put this in the closing paragraph:

> We believe that an investigation should be made immediately. We do not know whether we ourselves should ask the Justice Department to investigate or whether we should leave the handling of this matter entirely up to you. It is clear to us that you are the first person to whom the matter should be referred.

Now, here are the words I invite attention to:

> Whether or not a criminal violation has occurred, we certainly believe that if the Deering Milliken contract was thrown to Carolina Vend-A-Matic, Judge Haynsworth should be disqualified from participating in the decision in this case, and that the resulting two-to-two decision should lead to the sustaining of the NLRB decision below.

Now, so this statement coupled with the acknowledgement that Judge Haynsworth was a vice president of Carolina Vend-A-Matic contained earlier in the letter, conveyed the alleged criminal charge and also the charge of a conflict of interest. And that was investigated by Judge Sobeloff, and Judge Sobeloff sent a copy of a letter, wrote a letter on December 18, 1964, which is contained in the Department of Justice file. In the letter, Judge Haynsworth reviews all of these facts about Judge Haynsworth——

The CHAIRMAN. Let's have order.

Senator ERVIN (continuing). In connection with Carolina Vend-A-Matic, and he closed with a statement that "However unwarranted the allegation"—this is the first allegation—"since the propriety of the conduct of a member of this court has been questioned"—and it is questioned in two respects——

Senator KENNEDY. Does it say two respects?

Senator ERVIN. No, but I interpolate it was a question in two respects: First, whether there was evidence of a bribe and, second,

whether there had been impropriety by reason of Judge Haynsworth holding office in Carolina Vend-A-Matic.

Senator BAYH. Will the Senator yield?

Senator ERVIN. Not yet; wait until I finish this.

However unwarranted the allegation, since the propriety of the conduct of a member of this court has been questioned, I am today, at Judge Haynsworth's request and with the concurrence of the entire court, sending the file to the Department of Justice, together with an expression of our full confidence in Judge Haynsworth.

He sent the whole file, including Patricia Eames' letter stating that he ought to disqualify himself, irrespective of the other charge, the main charge. This was considered in the Department of Justice and a very brilliant Attorney General of the United States, Robert F. Kennedy, after getting this file and Judge Sobeloff's, the file from Judge Sobeloff, he says—

DEAR MR. CHIEF JUDGE: This will acknowledge receipt of your letter dated February 19, 1964, enclosing the file that reflects your investigation of certain assertions and insinuations about Judge Clement F. Haynsworth, Jr.

And I pause to interpolate that one of those assertions was that he should be disqualified by reason of his holding office in Carolina Vend-A-Matic.

Then he concludes with this paragraph:

Your thorough and complete investigation reflects that the charges were without foundation. I share your expression of complete confidence in Judge Haynsworth.

Thanks for bringing this matter to my attention.

Sincerely,

ROBERT F. KENNEDY, *Attorney General.*

Both things were brought to his attention.

The CHAIRMAN. Gentlemen, we will go over to 2:30.

(Thereupon, at 12:35 p.m. a recess was taken in the hearing, to reconvene at 2:30 p.m. this same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Senator COOK. Mr. Chairman, could I ask the indulgence of the members of the committee for just about 5 minutes? I have an appointment at HUD with my mayor and a few other people, and it is really important, and I would like to get one point into the record, one question, if it is agreeable with the members of the committee.

Senator BAYH. It is agreeable with me.

The CHAIRMAN. Go ahead.

Senator COOK. Thank you.

Judge, there is one question I want to ask you right at this point because I think it is important in regard to the interrogation which was going on just prior to our leaving, and I preface it with this: First of all, because apparently we are going on strict constructionism, as the Senator from Michigan was discussing this morning, because we are taking this record and giving it a very strict constructive point and no more.

Secondly, the point I would like to make is obviously the Textile Workers Union of America must have been totally and completely sat-

isfied with the report that was made and with Judge Sobeloff's report and the Attorney General's report because they made no motion for a new trial in the Fourth Circuit on the grounds we are now discussing, they made no mention of it in their motion for certiorari or the petition for certiorari in the Supreme Court of the United States, and made no mention of it at any time whatsoever, and on this basis, Judge, do you feel that this committee or the Senate as a whole is bound by the Sobeloff investigation or by the action of the Justice Department in 1964?

TESTIMONY OF HON. CLEMENT F. HAYNSWORTH, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES—Resumed

Judge HAYNSWORTH. No, I do not, sir, though I think what was done is important in fixing the context of the thing at the time.

The members of my court, of course, knew of my stock interest in Vend-a-Matic. I do not recall that I told them with precision that it was a one-seventh, but they knew I was one of a small group which owned it, and there is no fact that has been brought out since that was not known by the judges of my court at the time. I think if they thought there was any impropriety in my sitting they would have said so and they would not have written as they did to the Department of Justice. And I think it is important, too, in showing my reaction to the accusation at the time it came, that I was not content with an out-of-hand rejection. I wanted the facts developed at the time, and after it was done I wanted the whole thing submitted to the Department. These, I think, help to set the context.

But as far as foreclosing inquiry in the Senate, I do not think so. Indeed the question having been raised I want the Senate to pass on the merits. And my position is that if a hundred judges and a hundren bishops and everybody else swore in 1964 that I had committed no impropriety whatsoever, the question is before this Senate and I want the judgment of this Senate. I may say that while I am concerned about myself and my reputation, I much more am concerned about my country and the Supreme Court as an institution, and if there is substantial doubt about the propriety of what I did and my fitness to sit on the Supreme Court, then I hope the Senate will resolve the doubt against me. If there is no substantial doubt, I hope the thing can be laid aside so that the Supreme Court can serve, with me on it if I am there, as it should serve, as an institution deserving the respect of the people. So that I implore the committee itself, and the Senate itself, to consider what was done in 1964 in the context in which it was done, but not to feel foreclosed at all from reaching the merits of this matter and exercising its own judgment on the propriety of what I did.

Senator COOK. Thank you, Judge, and thank you, gentlemen, Mr. Chairman.

The CHAIRMAN. Gentlemen, could we have a short executive session.

(Whereupon, a short recess was taken in which the committee proceeded into executive session and after which the hearing was resumed.)

The CHAIRMAN. Now, Judge, there are a number of witnesses who have appointments who are here now, who were here a week ago to

testify but the hearings were canceled due to the death of Senator Dirksen. We have decided to take certain of those witnesses now, both on your side, and I have agreed to hear Mr. Meany tomorrow afternoon, whether you are through testifying or not. We are going to take these witnesses but I want you to hold yourself ready so that at the conclusion of that testimony you can go back on the stand.

Judge HAYNSWORTH. I will be at your beck and call, sir.

The CHAIRMAN. The witnesses we are going to call are from out of town. I do not think—I would like to get through with them before I call the Washington witnesses.

Mr. Frank?

Senator KENNEDY. Mr. Chairman, just before the first witness comes this afternoon, I would like to, if I could, make a very brief statement in terms of perspective, the debate which was underway when we recessed this morning, if I could do this at this point of the record today. There is no necessity for the judge to remain here.

Judge HAYNSWORTH. If I may be excused.

Senator KENNEDY. Just prior to the first witnesses this afternoon.

First let me say that I do not feel it is extremely important or relevant to us here now to decide exactly what the Justice Department in 1964 said or meant to say about the allegation against Judge Haynsworth. Even if they had done a thorough investigation and had explicitly cleared the judge of every conceivable legal or ethical violation, we would not be foreclosed from reexamining the matter now and making up our own minds. The only reason for going into this collateral debate now is that some people have tried to advertise Attorney General Kennedy's letter for something it was not. Judge Haynsworth himself was quoted by the Associated Press as saying that he thought his actions were and I begin to quote now, "entirely proper. I wouldn't have done it if I thought otherwise. The judges in my court thought it proper and Robert Kennedy thought so."

Two members of this committee have issued a press release asserting that the Justice Department considered all aspects of Judge Haynsworth's conduct, including the question of judicial ethics and conflict of interest, and that Judge Haynsworth was absolved of any misconduct.

Now these statements not only are not accurate—they could not be accurate, for my understanding of the practice of the Department of Justice at that time is as follows: if any question of judicial behavior was referred by anyone to the Department, the matter was referred in all cases to the chief judge of the court involved, unless there was some problem of a criminal violation. The questions of ethics and canons were left solely to the courts themselves in due respect to the proper separation and distribution of powers and responsibilities among the branches of the Federal Government. The fact is that if any questions of judicial ethics or the canons had come before the Department in some proper way, as for example in the form of proposed legislation, the division primarily responsible—as we have seen in the instance of Mr. Rhenquist's letter—would have been the Office of Legal Counsel.

Now if we look at the file, as placed in the Congressional Record for September 10, 1969, at page S10394, we can see exactly what hap-

pened. Judge Sobeloff sent the Department his file which, he said, had convinced the complainant that her "assertions and allegations about Judge Haynsworth were without foundation" and had persuaded the judges of the 4th circuit that "there is no warrant whatever for these assertions and allegations." Now the distinguished Senator Ervin and I have both read the relevant sections of Miss Eames' letter but let me do so again:

> Depending on a number of facts which we do not know but which could be discovered by an investigation with subpoena powers, there may or may not be violations of 18 U.S.C. Sections 201 and 202. It would appear, however, that only one fact which is now unknown—namely, whether or not the Deering Milliken contract was thrown to Carolina Vend-a-matic—needs to be known in order to conclude that Judge Haynsworth should have disqualified himself from participating in this decision.

And again:

> Whether or not a criminal violation has occurred, we certainly believe that if the Deering Milliken contract was thrown to Carolina Vend-a-matic, Judge Haynsworth should be disqualified for participating in the decision in this case.

It is important to note that the only fact tying Judge Haynsworth to Vend-a-Matic alleged by the informant and suggested by Miss Eames was that the judge was a vice president of the firm. And in the entire correspondence I have seen no indication that Miss Eames knew or that Judge Sobeloff knew or that the other judges knew or that the Department of Justice knew that Judge Haynsworth was a founder of Vend-a-Matic, that he continued to hold a one-seventh interest in the firm until 1964, that that interest was worth nearly half a million dollars, that he may have continued to assist in obtaining financing for the firm while he was on the court, that he himself was personally liable on corporate debt in the amount of perhaps several hundred thousand dollars, all facts which have only come to light recently. Nor could they have known of a fact which only came to light this morning, namely that all except 10 or 12 of the 46 major clients of Carolina Vend-a-Matic were involved in the textile industry, for which, as our colleague has pointed out, the *Darlington* case raised extremely important issues. Let me say that I have not made up my mind as to the relevance and impact of all these facts, but I do know that they were not known to or passed on by the fourth circuit or the Justice Department in 1964. The court and the department were focused on a simple allegation—that Deering Milliken vending contracts were "thrown" to a company of which Judge Haynsworth was a vice president, and therefore the Judge was either guilty of a violation of the bribery statutes or at least had to disqualify himself after the "throwing" of those contracts. The allegation appeared untrue, and therefore the suggested course of action was not called for. It is as simple as that.

Thank you very mueh, Mr. Chairman.

Senator ERVIN. I would just like to point out the question of ethics was also before Judge Sobeloff, Judge Sobeloff and the court, and he passed on the question on the record to show the ownership of this stock in Carolina Vend-a-Matic, but I agree with the first suggestion you made that whether they passed on this question or not, it does not relieve us of the duty to pass on it.

TESTIMONY OF JOHN P. FRANK, ATTORNEY, PHOENIX, ARIZ.

The CHAIRMAN. Mr. Frank?

Stand please, sir. Hold up your hand.

Do you solemnly swear the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FRANK. I do.

Mr. Chairman——

Senator KENNEDY. Just a minute, Mr. Frank. I think there was a question being addressed to the chairman.

The CHAIRMAN. Do you have a prepared statement?

Mr. FRANK. Yes, Mr. Chairman. The members should have two documents, letters to you, sir, a letter of September 3, which I hold in my right hand, and a supplemental letter of September 8, which the clerk has had in sufficient numbers so that I hope they may be distributed.

The CHAIRMAN. Will they be distributed, please?

Let us have order.

Senator HART. Mr. Chairman—I apologize for this, Mr. Frank.

We have just been advised that a witness who had sought to testify, Roy Wilkins of the NAACP, had been advised that it would not be possible for us to have outside witnesses today and that we would have to conclude with Judge Haynsworth. Based on that, and the fact that Mr. Wilkins leaves for Europe in the morning, he departed the city, and I now am advised is in New York.

The CHAIRMAN. I cannot hear you.

Senator HART. As my remarks indicated this morning, I may have greater concern with respect to the nominee's line of decisions than the degree of his conflict, and certainly Roy Wilkins will speak eloquently to that point.

Does anyone know how long Mr. Wilkins will be away? It may be possible that——

The CHAIRMAN. I would like to say this, that I have never made a statement of when any witness will testify. I know nothing about it, and I never heard it.

Senator HART. Let us inquire when he comes back.

Mr. Chairman, perhaps our concern is groundless. It may be that his absence is a matter of only a few days.

Mr. RAUH. Mr. Chairman, my name is Joseph L. Rauh, Jr. I am counsel to the Leadership Council on Civil Rights. I am to testify with Mr. Wilkins against the appointment of Judge Haynsworth. This morning Mr. Wilkins was here. Mr. Wilkins told the staff that he had to leave for Europe tomorrow morning. The staff told him under no circumstances would he be permitted to testify today, that the entire day would be used up by Judge Haynsworth. I find it most unfair, if your honor please, to bar Mr. Wilkins, who represents the leadership conference of millions of Americans, from testifying and having other persons who favor the witness to come here, but this comes directly from Mr. Wilkins, that he was told to go home this morning.

Senator BAYH. Will the Senator yield?

Mr. Rauh, could you deal with the question of when Mr. Wilkins will be back?

Mr. RAUH. It is a long trip. It is over a month. It is at least a month, Senator Bayh.

The CHAIRMAN. I know nothing about it.

Senator HART. Those of us who were advised, whose opinions were invited with respect to whether we would ask Judge Haynsworth to step aside, were told that the witness here, Mr. Frank, and several others had business engagements elsewhere in this country tomorrow and it was on that basis that of course we agreed.

Senator HRUSKA. It seems to me the committee is pretty much the master of its own destiny, and we met in executive committee and a case was laid before us for the convenience of witnesses. Maybe Mr. Wilkins is inconvenienced, but I might say if we adhered to what the staff informed him he would still not be able to be heard but there would be the added handicap and obstacle and inconvenience to three witnesses who can be heard.

The CHAIRMAN. Who on the staff informed you?

Mr. RAUH. Mr. Wilkins told me this morning that the staff had said that Mr. Haynsworth, Judge Haynsworth, would go through the day, indeed he left here on that very—he did not tell me, however—the staff has been telling everybody that Judge Haynsworth would be on all day.

The CHAIRMAN. What member of the staff?

Mr. RAUH. Well, Mr. Holloman told me that. It seems most unfair to bar the leader of the Negro movement in America at the same time you are putting on some proponent of Judge Haynsworth.

The CHAIRMAN. You made that point one time. [Laughter.]

Mr. RAUH. I did not not think it had gotten home.

Mr. HOLLOMAN. Mr. Chairman, throughout these hearings we have tried to keep all the witnesses as best we could as to our best estimate of the time they would testify. This morning a staff member did come to me and said that Mr. Wilkins was here, that he had a plane to catch this afternoon and asked if he would testify today. I told the staff member to advise Mr. Wilkins that in my opinion Judge Haynsworth would probably take the rest of the day. That was my best estimate, and it is the same estimate that we have given to all of the witnesses, and I am—I did not know that these witnesses would be called out of order, but it has been my estimate that the proponents possibly would be called after Judge Haynsworth.

Mr. RAUH. Judge Haynsworth would have taken the rest of the day if it had not been set aside for someone else. It could have been set aside for Mr. Wilkins.

The CHAIRMAN. Sit down, sir.

Senator HART. May I inquire when Mr. Wilkins leaves the country, and how?

Mr. RAUH. If Your Honor please, I think it is tomorrow.

Senator HART. What time?

Mr. RAUH. I am not sure, Your Honor. I will check that and report back. I will send you a note of the exact time of when Mr. Wilkins leaves and whether it would be possible maybe even to have a session tonight to hear him.

Senator HART. Well, Mr. Chairman, could I suggest then, in order to avoid what I think would be unfortunate and perhaps completely

unintentional, that the committee hear Mr. Wilkins before he leaves for Europe in the morning if it is possible for him to do it?

The CHAIRMAN. I would be glad to do that.

Senator HART. Thank you, Mr. Chairman.

The CHAIRMAN. I would be glad to do that.

Mr. Frank, you may proceed.

Mr. FRANK. Mr. Chairman and Senators, you should have before you two pieces of paper, one a letter of September 3, and another letter of September 8.

The CHAIRMAN. Identify yourself for the record, please, sir.

Mr. FRANK. Yes.

My name is John P. Frank of Phoenix, Ariz., and if I may answer the Senator's question rather more explicitly, at the appendix of the letter of September 3 there is a biographical sketch, and I take the liberty of mentioning the high spots there, but I am born and brought up in the State of Wisconsin and was educated at the University of Wisconsin and at Yale with the various legal and history degrees which are set forth there.

I have held various positions in the government and in private practice. I was law clerk to Mr. Justice Black at the October 1942 term, was assistant to Secretary Ickes and to Attorney General Biddle.

I taught law from 1946 to 1954 at Indiana University and at Yale Law School, and have taught at various other universities from time to time, but for 15 years I have been principally engaged as a practicing lawyer in Phoenix, Ariz., and as a practicing author principally on legal subjects.

I am the author or editor of some nine books largely on legal subjects, and these include several works on the Supreme Court and on related matters.

My forthcoming book to be published in the next few days is a work in the form of lectures given at the University of California Law School on the dedication of the Earl Warren Legal Center there.

I am a member of the Advisory Committee of the Supreme Court and the Judicial Conference on Civil Procedure, and I have been the author of articles in numerous magazines.

Senator Eastland, it is obviously of some relevance as to the attitude which one brings to these matters clearly has some bearing on where he comes out, and so in the first footnote to the letter of September 3 I have itemized a little bit about the matter of attitudes, and I, therefore, note that I have been associated by abiding conviction with the Democratic Party as a supporter of President Kennedy, President Johnson, and Vice President Humphrey, and I have been engaged in a good deal of litigation at one time or another involving public questions.

I believe that I had the honor of filing in the U.S. Supreme Court the first brief calling for total school desegregation in the case of Sweatt against Painter in 1950. I was one of the first to write in favor of that position which has become the one-man, one-vote rule, and most recently I was co-counsel in the case of Miranda against Arizona, on the prevailing side.

The forthcoming book I am about to have out is dedicated to Chief Justice Warren.

Now, the reason that you have asked me, Senator Eastland, to appear here is that in 1947 I wrote an article on the subject of disqualification of judges, which appeared in the 1956 Yale Law Journal, and that article is, so far as I know, is still the most extended discussion of that subject.

Now, I turn then to the precise matter which was the subject of a letter you sent to me, Senator Eastland, which was whether Judge Haynsworth might properly have disqualified in that case referred to as the *Darlington* case, and I have tendered to you the answer in the negative, that it would not have been proper disqualification practice for Judge Haynsworth to have disqualified himself in that case.

Now, in the statement which you have, which I assume it would be merely tedious to read and I shall not, we recite the details of what happened, but I have nothing put down on paper which is not what you already know, namely that the matter came to the court involving a labor dispute concerning the Darlington Co. In a loose kind of a way, Deering Milliken may be regarded as a holding company which had a 60 percent interest in Darlington as a kind of a subsidiary. In turn Judge Haynsworth had a substantial interest, a one-seventh interest, in a company called Vend-A-Matic, as you know. Vend-A-Matic, in turn, did business with some of the Deering Milliken subsidiaries but not with this one. The work which Vend-A-Matic had from the Deering Milliken subsidiaries amounted to about 34 percent of its total business, and it was obtained by a competitive bidding process.

Now, the precise question in disqualification terms which is presented is what is to be done in the so-called third party situation—that is to say where a judge is connected with a third party who, in turn, has a business connection of some sort with a party to a lawsuit, and that, reduced to its legal substance, is the problem which is here.

In this connection then we have the precise question, should Judge Haynsworth have disqualified himself in this case because he was connected with a third party, which, in turn, had such a business relation?

Now, if I may pass to page 3 of my statement, we reach the matter of the general principles of disqualification. There are, as you know, two basic sources of the law of disqualification: first is the common law which is drawn from England and second are the statutes which have been passed which add to that common law and to some extent alter them.

Now, in addition to that, in addition to the common law base on a statutory overlay, there is also what might be called a kind of a general coverage umbrella over the field which is the due process clause of the Federal Constitution, which is to say that some kinds of disqualification are so basic that they are not left to the statutes or to the common law but rather a person would be thought to be denied his constitutional rights if a judge participated in a case when in this extreme sense he was disqualified. and the two leading examples of this in English and American law are Dr. Bonham's case on which Lord Coke wrote—who held that not even an act of Parliament could permit a judge to participate where he got part of the fine which he would levy, and that principle is carried into the American law in the leading case of Tumey against Ohio.

So that our Supreme Court has laid down the rule that a fair trial must be a trial in which the full requirements of due process are met and no man is to be allowed to be a judge in his own case.

Now, at common law, as distinguished from the statutes, a judge could be disqualified only for what was technically known as interest, but this has been expanded by the growth of the law to cover other areas, so that we now have a triumvirate of grounds of disqualification and these are the three grounds of interest, relationship, and bias. And speaking in a general way for just a minute, and then I will be technical and apply to the matter in hand, interest is the personal involvement of the judge in the result, as, for example, if he has an interest in property which is being foreclosed. Relationship is family connection with a party or perhaps with an attorney, and bias is, let us say, a hostility to a party such as a longstanding personal enmity.

Now, these broad terms get their meaning only as they are interpreted further in the statutes and in the cases, and the principal interpretation in the federal system is set forth in 28 United States Code 455 to which you made many references in the course of these discussions already, and that is the Federal interest statute, and its says that any justice or judge of the United States shall disqualify himself in a case in which he has a substantial interest, has been of counsel, has been a material witness, is related and so on, but the heart of it for purposes of your matter is that the judge must disqualify if he has a substantial interest in that particular case.

Now, there is one other important generalization which needs to be mentioned. There are two views of disqualification in the United States which are reflected in the decisions and in the practice around the country. One is the so-called hard qualification view, and that is that the judge must be disqualified in the strict sense of interest, bias, or relationship. The other is a soft disqualification view which exists in my own State of Arizona and in most of the newer States, which really is that you can disqualify a judge simply because you want him out so that in our State we get simply what amounts to one peremptory challenge; we can remove one judge simply for the asking. But these two systems exist side by side in the United States and what we need to know, because it is rather controlling for the judgment which you Senators are now making, is that the Federal Government from the beginning has taken the so-called hard qualification view, and has added to that point of view the position which really is the most controlling single matter in the case which is before you, and that is that unless the judge is disqualified in the strict sense, he has an absolute duty to sit. In other words, in the Federal view, unlike the view of some of the States, the Federal judge is not entitled to say to himself—I think, Senator Bayh, you were developing this a little this morning—a Federal judge is not entitled to say himself, "I would simply like out," for whatever reason or "This is distasteful," or "I would rather not do it," but instead the Federal judge operates in a system which the cases have uniformly held from the beginning that either he is disqualified in the strict sense or he must sit; and there is not any third possibility.

Now, on that score, I take the liberty of referring you to the memorandum on September 8 which collects the cases from all of the cir-

cuits, directly on that point. The District of Columbia, first, second, third, fifth, sixth, seventh, eighth and ninth, and I have appended to that for your convenience the quotation from the most recent full discussion of this point which is the fifth circuit case in the matter of Edwards, and in that case you had almost identically what you have here in the very case you have now.

Senator BAYH. Pardon me, Dr. Frank. Would you repeat that case?

Mr. FRANK. Yes, Senator Bayh, may I refer you to the September 8 memo and if you don't have it could I have someone hand it to you.

Senator BAYH. I think I have it and I apologize to you for not hearing you.

Mr. FRANK. If the clerk has not distributed them, I turned in 30 and it should be there and I really think this is of the essence of your concern so I would be grateful if he would make distribution.

Senator BAYH. I have it, and I would say, if I might, as a word of explanation to both you and the committee that normally we are given prepared testimony of a witness in advance but we have not had a chance to review your information.

Mr. FRANK. Senator, I take it it has been raining paper and you are lucky to have a roof to fend some of it off but I do take the liberty of referring to the September 8 memorandum because in the discussion I have heard it covers most exactly the matter which may trouble you, and I particularly cite you to the discussion by Judge Rives.

Now, that case was virtually identical with the case which is before, which was before, Judge Haynsworth, that is to say, the court was sitting en banc. If Judge Rives sat there could be a decision because it was a majority of one. If he had not sat there could be no decision. He wanted out. He felt that he would prefer not to participate. He thereupon fully canvassed the matter with his fellows and wrote the opinion which is contained as a rather difficult photocopy on the last sheet, and in which he squarely holds exactly in accordance with all the other case, that he had to face the question. He was either legally disqualified or he must sit whether he wanted to or not. He was not legally disqualified, he therefore did sit.

Now, may I continue and turn back to my memorandum of September 3, picking up with the discussion at page 6. I am abridging, Senator, I hope I am not taking too long.

Let me turn to the application of the standard principles of disqualification to the case which is here.

In the first place, as I have tried to develop in this memorandum, it is immaterial that Judge Haynsworth was a shareholder in the vending company rather than that he owned it. That doesn't make any difference. The better view is that a shareholder stands in the same position as his corporation. And the rule is in the majority of cases, there are a few exceptions, apparently the Fourth Circuit makes some small exception, but the heavy weight of opinion in America is that if the judge has any interest in a corporation which is a party he may not sit.

In the poll which I conducted of all of the State Supreme Court Justices and the senior Circuit Judges of the United States in 1947, all but two of them adopted that view and while there are cases where judges have not sat where they had—for example, there is a case I

have cited to you here, a fellow had 20 shares on 13 million and he felt free to sit but the heavy majority view is if he has any stock in a party he does not sit.

On the other hand, where the judge has an interest in nonparty, and this is kind of a knife edge on which the thing depends, where a judge has an interest in a nonparty, the rules of disqualification in the United States are entirely different, and this is, I must say, partly a matter of commonsense you obviously have to draw the line somewhere.

This problem was faced in the year 1572 by an English court which was concerned with the problem of disqualification for relationship, and the English court said:

> All the inhabitants of the earth are descended from Adam and Eve, and thus are cousins of one another.

But the court also says:

> The further removed blood it is the more cool it is.

In other words, lines have to be drawn somewhere, and what the law has done is draw the line between an interest in the immediate party and an interest in a third party which, in turn, is doing business with an immediate party.

So that the rule of disqualification which has developed in the third party cases is a test of the immediacy or remoteness of the interest, and the rule as it is stated in the cases is that if a judge has an interest in a third party which in turn has business with a party, the judge's interest must be direct, proximate, inherent in the instant event. It must be affected by the direct outcome of the particular case or as it is said it must be direct, real and certain. It may not be remote or contingent.

Let me give this in a kind of direct way. The common place this arises, a judge has stock in a bank, the bank has loaned money to a party, a party is in a lawsuit with somebody and the cases derived in this fashion: If the judge has an interest in a bank, and the bank has loaned money to a plaintiff or a defendant, and a lawsuit arises which has nothing to do with that plaintiff or defendant, just like the *Darlington* case here, then the judge is disqualified if the bank cannot be paid unless the plaintiff or the defendant wins.

But if it really doesn't make any difference to the plaintiff or the defendant then the judge has the duty of sitting and he may sit.

Applying that standard principle which is fully developed in the cases, and I assume you don't want to be told about cases here which are fully set forth in this memorandum, but applying that principle here, what it means is that where a judge has an interest in a corporation which, in turn, does business with a party, the judge is not disqualified unless he has a direct, immediate interest for his third party in the result of a particular case.

So that, for example, if a judge owns General Motors stock, and somebody has an auto accident which involves a General Motors truck, the judge is not disqualified from hearing that case simply because the party had bought a truck from General Motors.

A leading case which articulates the rule pretty well is an Alabama case which is quoted near the end of my memorandum, and that was one of the cases in which a judge was a stockholder in a bank, and the

court held that there was no disqualification and it laid down the guiding rule that the mere existence of a business relation with one of the parties is to be regarded as too remote or contingent to constitute a ground of disqualification.

Now, it is those principles, if I may summarize, it is those principles, which are codified in the Federal statute. So that the Federal statute, in other words, says that a judge shall disqualify for interest, and a judge who has a stockholding interest in a third party which, in turn, does business with a party, does not have an interest unless there will be an immediate and direct result to him in that particular case.

In this situation that is so clearly not true as to make disqualification wholly inappropriate.

Now, a question has been raised as to the recent interesting case in the U.S. Supreme Court in the matter of Commonwealth Coatings which was decided in November of 1968. That was an appeal from an arbitrator's award. That case is pretty radically different from what we have here, because a provision of the American Arbitration Association rules requires an arbitrator to disclose a whole lot of information before he goes on to a case, and in this situation this arbitrator had not done so, held that he should have done so and a reversal resulted.

The inapplicability of that case to this one is best revealed by the colloquy which Senator Cook had a few minutes ago with Judge Haynsworth. In that matter the exact question was raised on appeal. In this case, the one that is before you, nothing of the sort was raised on appeal. All of these parties could have raised that question had they supposed that there was any relevance to the Commonwealth Coatings type rule or approach in the case which is the one of principal concern to you.

So if I may summarize and conclude, the exact question which was before Judge Haynsworth on a given day in 1963 was: Did he sit in this case or didn't he sit in this case. He could either disqualify or not disqualify.

In the light of the overwhelming body of American law on this subject and indeed I think without exception, I have reviewed the cases comprehensively for this appearance, being aware of its gravity and have worked on the matter previously, and I cannot find a reported case in the United States in which any Federal judge has ever disqualified in circumstances in the remotest degree like those here. There was no legal ground for disqualification.

It follows that under the standard Federal rule Judge Haynsworth had no alternative whatsoever. He was bound by the principle of the cases. It is a judge's duty to refuse to sit when he was disqualified, but it is equally his duty to sit when there is no valid reason not to.

It is possible that your committee may wish to change the rules of disqualification. It is possible that one of the committees, Senator Bayh's committee or another, may wish to make recommendations for altering of 28 U.S.C., section 455. But under the law as it has clearly existed to this minute and as it existed on a given day in the fall of 1963, I do think that it is perfectly clear under the authori-

ties that there was literally no choice whatsoever for Judge Haynsworth except to participate in that case and do his job as well as he could.

Thank you very much.

The CHAIRMAN. Any question?

Senator ERVIN. I would just like to make one observation: It appears here that after all of these facts were known to the other members of the Circuit Court of Appeals of the Fourth Circuit, and after they had been revealed to Miss Patricia Eames, counsel for the Textile Workers Union of America, the case came on again for hearing before the Fourth Circuit Court of Appeals on the last decision of the National Labor Relations Board, and notwithstanding the fact that all of these facts were known to the parties to that case, known to the associates on the bench of Judge Haynesworth, nobody challenged his right or questioned in any way his right to sit as a member of the court. Furthermore, as I understand it conflict of interest arises because of the fear that a certain mental lenience might be engendered by reason of a supposed conflict of interest. The facts show that Judge Haynsworth certainly didn't have any lenience toward Deering Milliken but that he rendered a judgment against Deering Milliken, the one in whose interest he was alleged to have been biased.

So it seems to me that the fundamental principle is that we want a fair trial and a fair tribunal as a basic requirement of due process and certainly a party that wins a lawsuit is in a hard enough place to put that judge was not qualified to render a decision in his favor.

Mr. FRANK. Thank you, Senator.

Senator ERVIN. That is what this case comes down to. Thank you very much.

Senator MCCLELLAN. May I inquire, were these letters and the documents that you submitted, were they printed in the record?

Senator HRUSKA. No, not yet.

Mr. FRANK. These were submitted.

Senator MCCLELLAN. I don't think they have been ordered printed in the record yet.

Mr. FRANK. No, they have not.

Senator MCCLELLAN. Without objection, I direct that the letter of September 3, and the subsequent letter of September 8, together with other documents to which you have referred in your testimony be printed in the record in full at this point. Let them be printed in full in the record at his point.

(The letters referred to follow:)

LEWIS, ROCA, BEAUCHAMP & LINTON,
Phoenix, Ariz., September 3, 1969.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: I respond to your request for an opinion as to whether Judge Clement Haynsworth might properly have disqualified himself in the case of *NLRB* v. *Darlington Mfg. Co.*, 325 F. 2d 682 (4th Cir. 1963).

You make this inquiry while Judge Haynsworth's appointment to the Supreme Court is pending before your Committee because of my article, *Disqualification of Judges*, 56 *Yale L. J.* 605 (1947), which is. so far as I know, still the most comprehensive report on both law and actual practice in that field; the article includes a questionnaire survey of all federal, circuit and state supreme courts.

Attached is a personal identification sheet, but a brief notation of points of view may be relevant here, and I append it in the note.[1]

I turn now to the precise matter.

QUESTION PRESENTED

Might Judge Haynsworth properly have disqualified in the *Darlington* case?

ANSWER

No; it would have been unsound practice to do so.

DISCUSSION

A. Facts

Deering Milliken Company in the early 1960's was a largely Milliken family-held textile selling house. It was also what can be loosely called a holding company, owning or dominating 17 textile manufacturers which had 27 plants. One of those plants was Darlington Manufacturing Company, in which the Deering Milliken group held a majority, but by no means all of the stock. Darlington fell into conflict with the Textile Workers Union in 1956 and went out of business. The broad legal question was whether Darlington had committed unfair labor practices, and if so, whether Deering Milliken should be held financially responsible.

Judge Haynsworth, when the matter reached his Court, was a substantial stockholder in Carolina Vend-A-Matic Co., a vending machine company which sold coffee and other refreshments. This company had "locations" in many places, including three of the twenty-seven Deering Milliken affiliates. The locations were obtained by competitive bidding. Deering Milliken did not pay Vend-A-Matic to come to the premises—Vend-A-Matic paid a premium to Deering Milliken, if anything was paid. It had nothing to do with Darlington. Revenues from those plants amounted to about three per cent of the vending company's income.

When the case came before the Fourth Circuit Court of Appeals, the judges concluded that its importance warranted hearing by all of the five Circuit Judges, of whom Judge Haynsworth was one. The Court decided three to two that there was no unfair labor practice, with Judge Haynsworth in the majority. Hence, it never reached the question of whether Deering Milliken was chargeable with the cost. The Supreme Court held that there might have been an unfair labor practice, depending upon facts which were not in the record, and that the Labor Board's opinion was not comprehensive enough to cover the case. It therefore vacated the decision of the Court of Appeals with instructions to send the case back to the Labor Board for further proceedings. On this remand, the Board found unfair labor practices and the Court of Appeals, Judge Haynsworth concurring specially, enforced the order. 397 F. 2d 760 (1968).

In late 1963, the Textile Workers Union of America, on the basis of an anonymous telephone call received by it, forwarded an allegation to Judge Sobeloff, the Chief Judge of the Fourth Circuit, charging improper inducements by Deering Milliken to Judge Haynsworth. Judge Haynsworth asked for a full-scale investigation and consideration, both by the Circuit Judges and the Department of Justice. On February 6, 1964, the Union, after the investigation, withdrew its complaint with warm apologies. The Court of Appeals Judges, after independent investigation, concluded that there was "no warrant whatever" for the charge; and Attorney General Kennedy expressed his "complete confidence" in Judge Haynsworth.

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[1] This is my thirtieth year as a law teacher, lawyer, and author. Politically, I was a strong supporter of President Kennedy, President Johnson, and Vice President Humphrey. In the constitutional field, I believe I filed, with others including the present Solicitor General of the United States, the first brief calling for a total end to school segregation (*Sweatt* v. *Painter*, 339 U.S. 629 (1950); was one of the first to advocate the rule which has become one man, one vote ("Political Questions," in *Supreme Court and Supreme Law* 36, 41 (E. Cahn ed. 1954)); consistently advocated the right to counsel rule which culminated in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); and was co-counsel on the prevailing side of the confession case of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Numerous books and articles reflect an abiding admiration for the work of Justice Hugo L. Black, and my immediately forthcoming work on law reform is dedicated to Chief Justice Earl Warren. I know Judge Haynsworth by virtue of twice having been a guest speaker on current developments in the law of civil procedure at the Fourth Circuit Judicial Conference, over which he presides, and as a fellow member of the American Law Institute.

B. Question

Clearly, if there were any basis whatsoever for the anonymous suggestion of improper inducement, Judge Haynsworth would not be considered for any post. But there is not, and we put the call aside as one of those unhappy prices which judges must sometimes pay for the vexation of disappointed litigants.

There remains, however, the question presented in your letter to me as to whether Judge Haynsworth should have disqualified himself in the case.

C. General Principles of Disqualification

Disqualification is a term generally applied to the process or result by which a judge disengages from participation in a particular case which he would otherwise hear. There is a technical distinction between disqualification or exclusion by force of law, and recusation, or withdrawal at the judge's discretion, but the latter term is now largely obsolete, and I put it aside.[2]

There are two sources of the law of disqualification. The first is the common law. The second is the statutes. But these are to some extent overlaid by the constitutional conception of due process. That is to say, some kinds of disqualification are so absolutely basic that justice would be altogether denied if a judge were allowed to participate in a case. This amounts to what might be regarded as the inner core of disqualification. Surrounding that inner core are the group of further restrictions which are not constitutional, but are simply refinements. Illustrative of the constitutional inner core is the famous case of Dr. Bonham,[3] in which Lord Coke said that not even an Act of Parliament can allow a judge to retain a fine which he levies; the case illustrates the axiom that "No man shall be a judge in his own case."[4] The *Bonham* principle was followed in 1927, when the Supreme Court held that a judge could not hear a case in which he received a portion of the fine which he might levy.[5] The guiding due process principle was restated by the Supreme Court when it said:

"A fair trial in a fair tribunal is a basic requirement of due process. . . . To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."[6]

At common law, a judge could be disqualified only for interest. This has expanded by decision and statute to cover today three grounds of disqualification—interest, relationship, and bias. Speaking generally for a moment, interest is a personal involvement in the result, as if the judge had an interest in a property being foreclosed. Relationship is a family connection with a party, or perhaps an attorney. Bias is a hostility to a party, as a long personal enmity.[7]

Clearly, those are broad terms, and can take meaning only in concrete cases. Before coming directly to the federal practice, we observe in the country as a whole two conflicting currents on disqualification. In some states, disqualification is easy; in my own, *e.g.*, one may have one change of judge almost for the asking. A simple affidavit will do it. In others, disqualification is hard—one must squarely show interest, relationship, or bias or keep the judge he has.

The federal practice tends to the latter view. Originating in a period of few judges, perhaps one in a state, where disqualification might well mean long delay, casual disqualification was not much welcomed. This is reflected in the two federal statutes:

"INTEREST OF JUSTICE OR JUDGE

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

2. 28 U.S.C. § 144:

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[2] This was a meaningful distinction in the federal system prior to 1949, when the applicable statute applied only to district judges and not to appellate judges; the appellate judges then frequently applied the statute to themselves. The adoption of 28 U.S.C. § 455 in that year as a general disqualification statute applicable to all judges makes this term of no consequence now. For discussion of these distinctions between House Judiciary Chairman Hobbs and Chief Justice Stone, see *A. Mason, Harlan Fiske Stone* 702–03 (New York: The Viking Press, 1956).

[3] Co. 107a, 77 Eng. Rep. 638 (K.B. 1608).

[4] Co. Litt. 141a.

[5] *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[6] *In re Murchison*, 349 U.S. 133, 136 (1955).

[7] For development of these generalizations, see my article.

"BIAS OR PREJUDICE OF JUDGE

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding * * *." (Remainder immaterial).

One other important generalization. Particularly in the federal practice, the judge has an *equal* duty to disqualify when he should and to sit when he should. "It is a judge's duty to refuse to sit when he is disqualified hut it is equally his duty to sit when tbere is no valid reason" not to; *Edwards* v. *United States*, 334 F. 2d 360, 362, n. 2 (5th Cir. 1964), a case in which the judge clearly regretted that he could not withdraw. This is the general federal view.[9]

D. This Case

If Judge Haynsworth were to have disqualified in this case, it would necessarily have been for interest. That is to say, there is no conceivable question of relationship or bias, apart from interest, as those terms are used in the law.[9] We must therefore give close attention to the concept of interest as it exists in disqualification cases.

This permits a sharpening of the general question: Under what circumstances, if any, must a shareholder of a company which has business dealings with a party, disqualify from hearing a case involving tbat party? For the sake of brevity, we may reach the answer with a series of numbered paragraphs:

1. For our purposes, it is immaterial that Judge Haynsworth was a shareholder in the vending company rather than owner of the company in a personal proprietary capacity. The law of disqualification, in the heavy majority and clearly better view, treats a shareholder as though he individually were the concern in which he holds shares. In other words, if a judge holds shares in a corporation wbich is in fact a party before him, he should disqualify as much as if he himself were a party.[10] As my study shows, every state and federal court reporting agrees that if the judge has a pecuniary interest in the party, he may not sit.

2. Where the judge has an interest in a non-party, however, the rules are entirely different. This is a necessary concession both to commonsense and to the practicalities of modern life. As was noted by an English court in 1572 dealing with the subject of disqualification for relationship, "All the inhabitants of the earth are descended from Adam and Eve, and so are cousins of one another," but "the further removed blood it is, the more cool it is."[11] Lines must be drawn somewhere.

Tbus at common law, a judge might have disqualified in a case involving taxes in an area in which he paid. But this is not the modern view.[12]

In these non-party cases, the rule of disqualification which has developed is a test of immediacy or remoteness of the interest. The interest must be direct, proximate, inherent in the instant event, and affected by the direct outcome of the particular case.[13] It must be direct, real and certain, and not incidental, remote, contingent, or possible.[14] The interest contemplated is a "pecuniary or

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[8] See *Wolfson* v. *Palmieri*, 396 F. 2d 121 (2d Cir. 1968); *United States* v. *Hoffa*, 382 F. 2d 856 (6th Cir. 1967); *In re Union Leader Corp.*, 292 F. 2d 381, 391 (1st Cir. 1961), *cert. denied*, 368 U.S. 927 (1961).

[9] We may for other reasons put aside 28 U.S.C. § 144; not only does it relate only to district courts, but it requires an affidavit procedure, and it is restricted to bias.

[10] This is the heavy majority rule; see cases collected at Note, 48 A.L.R. 617, updated in a comprehensive collection at 25 A.L.R.3d 1331. There is some refinements where the holding is very small; see *e.g.*, *Lampert* v. *Hollis Music, Inc.*, 105 F. Supp. 3 (E.D.N.Y. 1952) (20 shares on 13,881,016). See also my own article at 56 *Yale L. J.* 605, 637 (1947), reporting that in 33 state and federal courts there is disqualification in such circumstances, but that 2 state and 2 federal courts reported that disqualification might be waived where the holding was very slight, and 1 federal court reported that a judge had sat where the holding was very slight. Nonetheless, the view is overwhelming. There are also refinements not necessary to be considered here when the stock is held by a member of the judge's family; see Note, 4 *Minn. L. Rev.* 301 (1920). And see illustratively, *Goodman* v. *Wisconsin Elec. Power Co.*, 248 Wis. 52, 20 N.W.2d 553 (1945).

[11] *Vernon* v. *Manners*, 2 Plowden 425, 75 Eng. Rep. 639 (K.B. 1572).

[12] My article shows no judges disqualifying because they are taxpayers, and only two areas in which they disqualified because they would be affected by public utility rates.

[13] *Goodspeed* v. *Great Western Power Co. of California*, 19 Cal. App. 2d 435, 65 P.2d 1342, 1345 (1937).

[14] See cases collected at 48 *C.J.S. Judges* at 1048.

beneficial interest" in the case,[15] with equal attention both to the benefit and to its connection with the particular case.[16]

Some cases push this to the point of saying that in order to be disqualified for interest in these third party situations, the judge must be capable of being made an actual party to the case, but this is not the better view, which is that it is sufficient if he has a proprietary interest in the actual result of the actual case.[17]

3. Coming then squarely to the problem of judges who in some manner have financial relations with a party, the question may arise when the judge is connected with a supplier, as here; or in some other fashion is or is not connected with a creditor or debtor of the party. These problems have been solved as the foregoing principles clearly foreshadow. If the interest of the judge as creditor or debtor or supplier will in any way be affected by the case, then he must disqualify. Otherwise, he should not. For example, when there is a dispute over a corporate election in Corporation *A*, which in turn has a large claim against Corporation *B*, in which the judge is a shareholder, the judge was held disqualified to pass on the election because he would in effect be choosing who was to be in control of a lawsuit against him.[18] Similarly, where a judge is a stockholder in a bank which is a creditor of plaintiff for a substantial amount, and plaintiff is dependent upon a judgment in the particular case to pay the bank, the judge was disqualified. *Jones* v. *American Cent. Insurance Co.*, 83 Kan. 44, 109 P. 1077 (1910); and note opposite result where judge is creditor but will not be affected by the result, *Dial* v. *Martin*, 37 S.W. 2d 166 (Tex. Civ. App. 1931). On the other hand, where there is no direct effect in any meaningful way, the judge is not disqualified. Thus a judge who is a stockholder in a bank which is restrained as a stakeholder but will not be affected by the final outcome was not disqualified.[19]

The Supreme Court of Michigan has emphatically rejected a view that a judge who is a shareholder of a creditor of a party, even on a substantial obligation, is disqualified in the absence of a showing of some direct and precise benefit to the creditor from the case; a suggestion to the contrary is said to have "no foundation in reason."[20]

A leading case very close to the instant situation is *Webb* v. *Town of Eutaw*, 9 Ala. App. 474, 63 So. 687 (1913), in which the judge was a stockholder in a bank to which a party was indebted. The Court, in holding no disqualification, laid down the guiding rule that the mere existence of "a business relation with one of the parties to it is to be regard as too remote or contingent to constitute a ground of disqualification." The disqualification will exist only where the corporate creditor or the judge who is a stockholder in it "has such a direct and immediate interest in the result of the suit" as to be disqualified.[21]

4. The principles just outlined are codified in the controlling federal statute, 28 U.S.C. § 455; the judge is disqualified "in any case in which he has a substantial interest." This requires a substantiality of interest in the particular case.[22]

CONCLUSION

A judge with an interest in a third party which in turn has business relations with a party to a case is not disqualified for interest unless somehow the case directly affects the third party. Any contrary result would lead to impossible

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[15] *United States* v. *Bell*, 351 F.2d 868, 878 (6th Cir. 1965); *Edwardson* v. *State*, 243 Md. 131, 220 A.2d 547 (1966).

[16] *Beasley* v. *Burt*, 201 Ga. 144, 39 S.E 2d 51 (1946).

[17] *Hall* v. *Superior Court*, 198 Cal. 373, 245 P. 814 (1926) (judge owns property in an irrigation district immediately involved in litigation); for a view requiring a party capacity, see another California case, *Central Pac. Ry. Co.* v. *Superior Court*, 211 Cal. 706, 296 P. 883, 888–89 (1931). The proper test is whether the third party has a "present proprietary interest in the subject matter." *City of Vallejo* v. *Superior Court*, 199 Cal. 408, 249 P. 1084 (1926). If so, the judge is disqualified or worse. In Anonymous, 1 Salk. 396, 91 Eng. Rep. 343 (K.B. 1698), the judge was "laid by the heels" for sitting in an ejectment case when he was lessor of the plaintiff.

[18] *Bentley* v. *Lucky Friday Extension Mining Co.*, 70 Idaho 511, 223 P.2d 947 (1950).

[19] *Adams* v. *McGehee*, 211 Ga. 498, 86 S.E.2d 525 (1955).

[20] *In re Farber*, 260 Mich. 652, 245 N.W. 793, 795 (1932).

[21] *Id.* at 688. The same problem arises when municipal bodies are called upon to award contracts for public works and it is frequently held that the mere fact that a municipal officer is a shareholder in a supplier of a contractor is not a disqualification; *O'Neill* v. *Town of Auburn*, 76 Wash. 207, 135 P. 1000 (1913).

[22] As was said of a third-party involvement under an earlier form of the statute, where the judge as shareholder of a creditor was wholly unaffected by the case, the interest to disqualify may be "so slight or inconsequential that the rights of the parties would be best subserved by his proceeding * * *." *Utz & Dunn Co.* v. *Regulator Co.*, 213 F. 315, 318 (8th Cir. 1914).

consequences. If, hypothetically, a judge owned stock in a major automobile company, he would be disqualified from hearing auto accident cases if a party happened to be a regular purchaser of cars manufactured by "his" concern. In the present case, the issue was a determination of an unfair labor practice involving a subsidiary of a large concern which had no connection except common ancestry with other plants with which Vend-A-Matic did business. Vend-A-Matic's locations were obtained by competitive bidding. It did business, not with Deering Milliken except as it paid for the privilege of installing machines, but with its employees. The proportilon of its revenue from this source was slight. There was no issue in the case which related even in the remotest or most fanciful degree to coffee and food distribution by Vend-A-Matic. A review of *all* of the reported cases on disqualification in the United States shows no instance in which a judge has ever disqualified in circumstances in any way similar to those here.[23]

In the instant case, it was necessary to have all of the judges of the Circuit participate; it was an *en banc* determination. Had Judge Haynsworth not participated, the Court would have been uuable to decide the case at all. But regardless of that circumstance, since he was not disqualified, it was under the strict federal rule of duty, his plain responsibility to participate, and he would have shirked his duty if he had not done so. There is "as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In re Union Leader Corp.*, 292 F. 2d 381, 391 (1st Cir. 1961), *cert. denicd* 368 U.S. 927 (1961).

Yours very truly,

JOHN P. FRANK.

BIOGRAPHICAL DATA OF JOHN P. FRANK

John P. Frank, lawyer and author, was born in Appleton, Wisconsin, in 1917, and received his B.A., M.A. and LL.B. at the University of Wisconsin and his J.S.D. from Yale University. He has held various governmental positions, having been law clerk to Mr Justice Hugo L. Black at the October, 1942, Term, and having served as an assistant to Secretary of Interior Ickes and as a special assistant in the Department of Justice under Attorney General Biddle.

Mr. Frank taught law from 1946 to 1954 at Indiana and Yale Universities, specializing in constitutional law, legal history, and procedure, and has been a visiting professor at the University of Washington and the University of Arizona. From 1954 to the present, he has been a member of the firm of Lewis, Roca, Beauchamp & Linton in Phoenix, Arizona.

Mr. Frank is the author or editor of nine books, largely on legal subjects. These include *Marble Palace* and *The Warren Court*, books on the United States Supreme Court; *Lincoln as a Lawyer;* and *Justice Daniel Dissenting*, a biography of a nineteenth century Supreme Court Justice. His lectures at the opening of the Earl Warren Legal Center at the University of California will shortly be published under the name of *American Law: The Case for Radical Reform.*

Mr. Frank is a member of the Advisory Committee on Civil Procedure of the Judicial Conference of tbe United States. He is also the author of numerous articles in legal and popular magazines, including *Fortune*, *Redbook*, *Reader's Digest*, and otbers.

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[23] While dealing with a different situation, *Commonwealth Coatings Corp.* v. *Cont. Cas. Co.*, 393 U.S. 145 (Nov. 18, 1968), should be mentioned. This case involved an appeal from an arbitrator's award. A provision of the American Arbitration Association rules requires an arbitrator to disclose information which "might disqualify" himself before the arbitration. The arbitrator here did not disclose a course of dealings as an engineer employed by one of the parties which included dealings in the very project in dispute in the case to be arbitrated. The award, therefore, was set aside. There is no equivalent rule as to judges: the instant case does not involve the same project; and in *Coatings*, the employment was by personal choice for personal services, while in *Darlington*, the contract was with a corporation chosen by competitive bidding. The immateriality of the *Coatings* principle is confirmed by the fact that the Union, informed of Judge Haynsworth's connection with a Vend-A-Matic, not only did not raise the matter of disqualification on appeal, as in *Coatings*, but instead expressed regret at having taken the subject up at all.

LEWIS, ROCA, BEAUCHAMP & LINTON,
Phoenix, Ariz., September 8, 1969.

HON. JAMES O. EASTLAND,
Senate Office Building,
Washington, D.C.

DEAR SENATOR EASTLAND: In supplement to my letter of September 3, 1969, to you, I add the following citations on the proposition that if a federal judge is not disqualified, he must sit.

As it is sometimes worded, "[i]t is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason" not to. *Edwards* v. *United States*, 334 F.2d 360, 362, n. 2 (5th Cir. 1964); or, when there is no legal ground for disqualification, "it is not only the right, but the sworn duty of a trial judge to preside, * * * ." *United States* v. *Valenti*, 120 F. Supp. 80, 92 (D.N.J. 1954).

Cases to the foregoing effect, grouped by circuits, are:

D.C. Circuit: *Tynan* v. *United States*, 376 F.2d 761 (D.C. Cir. 1967); *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.C.D.C. 1965).

1st Circuit: *In Re Union Leader Corp.*, 292 F.2d 381 (1st Cir. 1961), *cert. denied*, 368 U.S. 927 (1961).

2d Circuit: *Wolfson* v. *Palmieri*, 396 F. 2d 121 (2d Cir. 1968); *Rosen* v. *Sugarman*, 357 F. 2d 794 (2d Cir. 1966); *Town of East Haven* v. *Eastern Airlines, Inc.*, 293 F. Supp. 184 (D.C. Conn. 1968); *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y. 1968); *United States* v. *Devlin*, 284 F. Supp. 477 (D.C. Conn. 1968).

3d Circuit: *Simmons* v. *United States*, 302 F. 2d 71 (3d Cir. 1962); *United States* v. *Valenti*, 120 F. Supp. 80 (D.C.N.J. 1954).

5th Circuit: *Edwards* v. *United States*, 334 F. 2d 360, (5th Cir. 1964); *Broome* v. *Simon*, 255 F. Supp. 434 (W.D. La. 1965).

6th Circuit: *United States* v. *Hoffa*, 382 F. 2d 856 (6th Cir. 1967); *Pessin* v. *Keeneland Association*, 274 F. Supp. 513 (E.D. Ky. 1962).

7th Circuit: *Tucker* v. *Kerner*, 186 F. 2d 79 (7th Cir. 1950); *In Re Facilities Realty Trust*, 140 F. Supp. 552 (N.D. Ill. 1956), *rev'd on other grounds*, 220 F. 2d 495 (7th Cir. 1955).

8th Circuit: *Walker* v. *Bishop*, 408 F. 2d 1378 (8th Cir. 1969); *United States* v. *Love*, 259 F. Supp. 947 (D.C.N.D. 1966).

9th Circuit: *United States* v. *Shibley*, 112 F. Supp. 734 (S.D. Cal. 1944).

The case most nearly identical to the instant situation is *Edwards* v. *United States*, 34 F. 2d 360 (5th Cir. 1964); this also was an *en banc* case in which a challenged vote was the margin of decision. I attach a copy of footnote 2 of that opinion.

Respectfully submitted.

JOHN P. FRANK.

ALBERT EDWARDS, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

S. FRANK EDWARDS, APPELLANT
v.
UNITED STATES OF AMERICA, APPELLEE

Nos. 19827, 19828.
United States Court of Appeals, Fifth Circuit, July 10, 1964

Rehearings Denied Sept. 23, 1964

Before TUTTLE, Chief Judge, and RIVES, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges

2. Judge Hays, the organ of the Court on the original opinion, is a judge of the Second Circuit who was sitting by designation. Judge Cameron, who concurred with Judge Hays, died on April 5, 1964, after a rehearing en banc was ordered but before the case was orally argued and submitted on rehearing. Thereafter I asked the advice of my brothers, stating to them that "since neither Judge Hays nor Judge Cameron can participate in the en banc rehearing on Monday, May 11, it seems to me that to insure complete fairness to both sides, and especially the appearance of fairness to the appellants, I should recuse myself and let this case be considered and decided by the remaining active judges of the Circuit."

Chief Judge Tuttle and Judges Jones, Brown and Gewin advised that I should sit, and Judge Bell advised that he agreed with my tentative view but did not think it inappropriate for me to sit. I did not hear from Judges Hutcheson and Wisdom.

After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preference or individual views as it does on the law, and that, under the law, I have no choice in this case.

It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation. Banco Nacional de Cuba v. Sabbatino, 2d Cir. 1962, 307 F.2d 845, 860, reversed on the merits by Supreme Court on March 23, 1964, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804; United States v. Valenti, D.C.N.J.1954, 120 F. Supp. 80, 92; 48 C.J.S. Judges § 93a. If a party is dissatisfied and makes timely objection, a judge's decision to refuse to act on a case is subject to review. Medlin v. Taylor, 1893, 101 Ala. 239, 13 So. 310; 48 C.J.S. Judges § 93b. The only two statutes on disqualification which I found are §§ 47 and 455 of Title 28, United States Code, neither of which would appear to have any application to my situation. Judges sit as a matter of course on rehearings of their own decisions. See 30A Am.Jur. Judges, § 185. If either or both of the other judges who participated in the original decision could sit on the en banc rebearing there could be no question that I must also sit. While their absence makes me prefer not to sit, I have not found that it furnishes me any legal excuse.

A court en banc consists of "all active circuit judges of the circuit," 28 U.S.C. § 46(c). In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

Senator McCLELLAN. I am intrigued by your background here and what you have advocated in the past. Obviously, you are not prejudiced against the present Court, are you?

Mr. FRANK. Very definitely not, Senator McClellan. I suppose I am one of the foremost publicists in the support of Chief Justice Warren and whom I ardently admire and the work of his Court. But I take the liberty, I hope without sanctimony, but there is another canon involved here beyond those which have been mentioned and that is canon 8 of the new Canons of Ethics. Canon 8 expressly puts upon the bar the duty of rising to defend judges from unjust criticism, and I think for that purpose it is not material under canon 8 whether we agree with a particular judge or whether we don't. Obviously given my point of view and experience I would without doubt have preferred a different administration to be appointing a more liberal Justice. But my side lost an election, and the fact of the matter is that as a member of the bar we are called upon by canon 8 to rise to the defense of judges unjustly criticized, and it is my abiding conviction, sir, that the criticism directed to the disqualification or nondisqualification of Judge Haynsworth is a truly unjust criticism which cannot be fairly made.

Senator McCLELLAN. I see. So you feel like that in appearing here and giving your testimony you are not serving any partisan purpose but you are here simply in the interests of justice, to see that the Canons of Ethics are observed and meeting your responsibility that you feel as a member of the bar and as one who has been the author of books covering this particular subject.

Mr. FRANK. Having been asked by Senator Eastland to respond on a matter which is within the field of my expertise it seemed the clear duty to do so regardless of what I may think about the merits of the matter.

Senator McCLELLAN. Thank you very much.

Senator ERVIN. There is one other observation I would like to make. The question that was brought before the circuit court in 1963 at the time where it is alleged that Judge Haynsworth should have disqualified himself was a question of whether or not the circuit court would enforce the decision of the National Labor Relations Board. Judge Haynsworth joined in the opinion of Judge Bryan that the circuit court should not do so. An appeal was taken from that ruling to the Supreme Court of the United States and the Supreme Court of the United States in substance held that the circuit court was right in not enforcing the then decision of the National Labor Relations Board because the National Labor Relations Board had not tried and determined and made findings of fact about all of the issues in the case and that the case therefore had to go back to the National Labor Relations Board in order that the National Labor Relations Board might take further evidence and make a further decision as to the other issues that were necessary to make a decision in the case. Is that not correct?

Mr. FRANK. That is exactly correct, Senator.

Senator ERVIN. And so the result of the case was that the Supreme Court held at that time the circuit court of appeals was right, legally speaking, in not ordering the enforcement of the decision of the National Labor Relations Board when the National Labor Relations Board had not fully determined all of the issue necessary to a determination of the law.

Mr. FRANK. That is correct.

Senator HRUSKA. Mr. Frank, earlier today there was a good deal of testimony and comment about the fact that many of the customers of Vend-A-Matic Co., in which Judge Haynsworth at one time had a one-seventh interest, were textile mills. Further reference was made during the course of the morning to the fact that many of the clients of the law firm in which he was a former partner, were textile mills. The idea presumably was to raise the question of how could a judge with that type of background, how could a lawyer with that type of background, listen to a case involving a textile mill and not be disqualified from sitting in judgment in that case.

If that were the question, what would your response be to it?

Mr. FRANK. Senator, allow me to respond simply technically. The law of disqualification has never been that a judge should be disqualified in cases which relate to that branch of the practice with which he happens to have had experience. Thus and concretely, Mr. Justice Harlan of the present Supreme Court comes from a Wall Street practice representing great corporations. Mr. Justice Black comes from a practice in which he has represented the poor persons in damage cases. No one has ever suggested even in the remotest degree that Justice Harlan should not sit in cases of a Wall Street tinge or that Justice Black should not sit in cases involving plaintiffs in damage type situations. It is simply not relevant to the question of disqualification. Obviously any judge will be the product of his experience.

Senator HRUSKA. Mr. Frank, as a matter of fact, we had before this committee some years ago a most illustrious lawyer who achieved great renown in labor law. He served as special counsel for the AFL–CIO and as general counsel for the U.S. steelworkers. Much of his practice, the bulk of it, had to do with labor law. Then he was Secre-

tary of Labor, and then we confirmed him here as a Justice of the Supreme Court.

Would you be prepared to say that this committee or the Senate erred in approving him as Judge and setting him out on a very brilliant careers as Justice of that Supreme Court and later on as Ambassador to the United Nations?

Mr. FRANK. Senator, I suspect that your question is rhetorical and, therefore, will you indulge me if I respond in a slightly partisan spirit? I wish we could have him back again. [Laughter.]

Senator HRUSKA. As a brother in the law, I wouldn't consider that as a partisan spirit at all. I think it is the lawyer in you speaking.

We had another example. We had a man who served for many, many years as counsel, as I remember, of NAACP and civil rights groups. He was confirmed by this committee and by the Senate first to sit on the circuit court of appeals and then to sit on the Supreme Court. That was Justice Thurgood Marshall. He was by no means a nonpartisan person in the field of civil rights litigation. He was quite partisan and yet this committee felt that he was a man of judicious temperament. He was a man of integrity. He was a man who was successful in the practice. While it is true the bulk of it had to do with a certain field of the law we nevertheless approved him regardless of his political philosophy and his efforts along a certain line. We said that is none of our business. That is the President's business, and I admired your nonpartisan contribution this afternoon when you said your party lost the election and, therefore, control over the decision of a new President.

Returning to Justice Thurgood Marshall, was this committee and was the Senate in error when they confirmed him and gave him a chance to sit in the "great marble palace" in the words that you used in your book?

Mr. FRANK. Pretty obviously not. I had the pleasure of carrying his briefcase in the first great segregation case involving the schools, and a fine lawyer, a fine man and a fine judge, and not disqualified at all, and it is a direct parallel. He is drawn from a special background. He is not disqualified from using the knowledge gained in a lifetime of effort to deal with the cases which come before him.

Senator HRUSKA. It is strange, Mr. Chairman, that virtually the same people who had no word of objection to two of those nominees who came before this committee in recent years, drawn from special laws or practice. Those nominees were not attacked nor were they even criticized. They were praised for the success that they had achieved in their respective fields and they were promptly confirmed. And now for some reason, maybe it is because this nominee is appointed by a different President, maybe it is because he has a different philosophy, there is a change. And here let the record show that this Senator in the hearings of the last 12 years has always made a point of the fact that it is up to the President to make his choice of philosophy, and if we don't like it, we ought to elect a new President. Fortunately from my standpoint and those who think like I do we did so last November and that is why we are in here this afternoon. Despite the slight delay I have every confidence we shortly will approve this nomination.

Thank you, Mr. Frank, for a very interesting and clearly written paper on this subject.

Mr. FRANK. Thank you, Senator.

Senator ERVIN. While we are giving illustrations, I wish to say that on this question of disqualification that my good friend from Michigan, Senator Hart, and my good friend the late Senator McNamara of Michigan, recommended to the President a few years ago the appointment of a man to be a circuit judge in that circuit, Judge Edwards, who had been a very active member of the UAW, and was so active in his younger days that he was sentenced to jail for violation of an injunction which had been issued in connection with the sitdown strikes of some years ago. It happened to be my fate to be appointed chairman of an ad hoc committee to pass upon the qualifications of Judge Edwards to be confirmed as circuit judge for that circuit. And I found that notwithstanding his association with the union and notwithstanding the fact that he even served a term in jail for contempt of court, that he was a man that, in my judgment, could uphold the scales of justice fairly and impartially, and I recommended his confirmation to the full committee, and the full committee confirmed him and he is now making a very distinguished record on the court of appeals of that circuit.

The CHAIRMAN. Senator Bayh.

Senator BAYH. Thank you very much, Mr. Chairman.

Professor Frank, it is good to have a man of your expertise in this area share his thoughts with us on something that I suppose we all would have to admit is not really a finely drawn science.

It has been a certainly frustrating thing to me, this business of trying to determine where you draw a line between propriety and impropriety.

You mentioned, quoting the United States Code, these three criteria. One was a substantial interest.

Mr. FRANK. Yes.

Senator BAYH. Would you state the other two?

Mr. FRANK. May I refer you to the exact language, Senator. The Code provision is set forth at page 5 of the memorandum which I think you have. Would you like me to quote the language at this time?

Senator BAYH. Yes.

Mr. FRANK. It is "Any Justice or judge in the United States shall disqualify himself in any case in which he has a substantial interest."

It then goes on to other elements which are not material here.

Senator BAYH. Fine.

How large an interest is substantial interest.

Mr. FRANK. Senator, the matter that he has a substantial interest in the particular case. My personal view is that if he has any interest in that particular case really he should disqualify. There is some conflict in the authorities in the Federal cases on this point. It usually arises when the judge owns shares in a corportion which is a party and he has a very small share holding.

Senator BAYH. Let me——

The CHAIRMAN. That is a rollcall. We will have a brief recess.

(Brief recess.)

The CHAIRMAN. The committee will come to order.

Senator Bayh, will you proceed?

Senator BAYH. Thank you, Mr. Chairman.

Mr. Frank, I am not too certain where we were here.

Mr. FRANK. We were talking, Senator, you had picked up the language of 455 and wanted to——

Senator BAYH. I asked you about how large a substantial interest was.

Mr. FRANK. Yes.

Senator BAYH. About the time the bell rang.

How large is a substantial interest?

Mr. FRANK. I think that generally the better view, Senator, but not the only view, is that if there is any interest it ought to be regarded as a disqualifier. But the word "substantial" is used here to cover the marginal situation of the small stockholdings, let us say, in a corporation, somebody has a few shares of GM, that sort of thing. I have given an illustration in one footnote of a case of a district judge in the second circuit who had, as I said, 20 shares on 13 million and felt, thought it wasn't enough.

In my report in 1947, 33 State and Federal courts felt if there was any holding of stock they thought it should disqualify. Two courts thought if the holding was very small they felt it should not disqualify, and you heard Judge Haynsworth state that was the view of the fourth circuit.

Senator BAYH. Then general nationwide authority on substantial interest would be that if you hold stock of any appreciable value in any corporation that is before you, you should automatically disqualify yourself?

Mr. FRANK. Yes, that is certainly my view of it.

Senator BAYH. You heard me question the judge this morning about the ownership of 550 shares of J. P. Stevens, which is sort of a constant litigant, I understand, in the textile area. In that particular case he suggested that it was not because of the stockholding interest but because of the close client relationship that he would disqualify himself. Do you feel from what you just said that if there had been that client relationship, this standard would have compelled him to disqualify himself in the case?

Mr. FRANK. Senator, in the overwhelming majority view, and there is a citation here of the most recent ALR note, shareholding would be enough. Any. But it is not quite unanimous. There are a few courts in the country, apparently the fourth circuit is one of them, that takes the view that very small holdings are not that disqualifying at least upon a waiver. Now, whether 500 shares of J. P. Stevens amounts to anything or whether it is a mere flyspeck I have no idea. In that case the judge did testify that he was also disqualifying on the second ground of bias, that is, he felt too closely linked to the company.

Senator BAYH. We would be interested in seeing $22,472.50.

Mr. FRANK. That is obviously beyond the trifling stage.

Senator BAYH. It is substantial to me, it may not be substantial to others.

Mr. FRANK. Senator, it is substantial to me.

Senator BAYH. I don't want to embarrass you with this next question but after studying this, and suggesting that you would rather see someone else appointed to the bench, nevertheless you have an affirmative conviction in analyzing the *Darlington* case. You came

to the conclusion, I don't want to put words in your mouth, but you thought in that case given the circumstances there was not a sufficient interest that should have disqualified the judge from sitting. Is that correct?

Mr. FRANK. That is correct, because there is not any interest as that term is used in the law. It is zero interest.

Senator BAYH. Let me ask you about another specific case. *Brunswick Corp.* v. *Long*, 392 Fed. 2d 348, which was tried last year before Judge Haynsworth in which he sat on that decision and cast a vote for the majority which ruled in favor of Brunswick Corp. In looking at his portfolio of stock I see that he today has 1,000 shares of Brunswick Corp. worth, well, depending upon whose figures you use, I see on a list that was submitted to us $17,500 as of Tuesday, and as of right now it is worth $18.25 a share, so obviously it is worth a little more.

I have not yet checked out whether he did in fact own it last year when this came before him, but if he did is that a sufficient interest that he should have disqualified himself instead of sitting in that case?

Mr. FRANK. It certainly is my view that a judge should not sit in a case in which he owns stock in a party to the case.

Now, as to this particular case, I haven't the faintest idea at all because I never heard of it before.

Senator BAYH. Well, in fairness, I think, we should hear the judge as to whether he owned the stock.

Mr. FRANK. Well——

Senator BAYH. We can check that out, but since you are here now, I wanted to get your opinion of that particular case.

Mr. FRANK. You will find the authorities on the exact point of ownership, I won't waste your time, but you will find them in the memorandum which I have given you with full citations which the staff can get all of you in a hurry.

Senator BAYH. One more go-around on Darlington and we will leave it because we have had a go-around and it is worn out. I want to say prior to that that I think my good faith, as one member of the Senate, recognizing the need for a sound textile industry can be seen by the fact that I have in the past cosponsored one of our colleagues, Senator Hollings' resolution dealing with the problem of preventing unfair competition in foreign trade with textiles. I don't think that my record, although it may be criticized by some who are opposed this appointment, can be called antitextile. Now I want to go through this point by point and then get you to answer a question. I don't know whether you were here when Senator Ervin expounded at some length about the significance of the *Darlington* case as far as the future of the textile industry is concerned. Given that particular case, given a distinguished lawyer, now a jurist, whose firm has had extensive dealings with textile firms, given a relationship with another corporation, which now is in the record as being partly owned by the judge, in which he was a director and a vice president, in which his wife was secretary, in which he was trustee for the pension fund investments, and given what we tried to point out this morning, which we did not know prior to that time, the total impact of textile business, textile

related business, to the corporation, you still feel that that does not constitute substantial interest as described in the code?

Mr. FRANK. Yes, Senator, the term we are using substantial interest as it is used in the code and as it is used, is obviously a technical term. and if I may put it loosely and then be more precise, the items you mentioned in terms of the law of disqualification really come to nothing.

You have put together two elements, and neither, together nor their cumulative effect, has consequences in that body of the law. First, the interest in Venda-A-Matic is an interest in a third party which supplies or deals with a party to a lawsuit. I covered that earlier. That is under all of the cases not a ground of disqualification for a judge unless his third party in some direct and concrete way gets some direct and concrete benefit as a result of the case.

The other is the fact that the judge is drawn from a particular background or milieu, judges usually are, and this is simply not treated as a ground for disqualification so far as I know anywhere. It would be if it involved his particular clients, if it involved an intimate relationship and so on that would be different. But the mere fact a given lawyer was nurtured to his professional eminence in textiles or in race relations or in labor law or in corporate law and so on, has never been treated as a ground for disqualifying him in cases of that kind.

Senator BAYH. In Senator Hruska's questioning he alluded tangentially, if not directly, to a former judge, Justice Goldberg, who had had relations with labor unions. In the *Darlington* case, when it got to the Supreme Court, as you know, Justice Goldberg disqualified himself. Was he right or did he have a duty to sit?

Mr. FRANK. My impression of Justice Goldberg's practice is that he disqualified himself where the particular case involved a union which he had fairly recently directly represented, and I assume that to be so in this particular instance or where he had a relationship with a parent group and then the union was part of that parent group. I don't believe that Justice Goldberg disqualified himself in cases which dealt generally with labor relations.

Senator BAYH. This is client relationship. I did not fill that in because I was sure you were aware of it.

Mr. FRANK. But it could be thinner than that. Justice Black disqualified himself when his son was connected with certain labor unions.

Senator BAYH. Let me ask you why in the well documented information you have given us, there was little or no reference to the canons of judicial ethics? Why were the canons not significant enough to be considered in your brief?

Mr. FRANK. Because I did not deal with the canons. Because I think for purposes of the Federal courts they are simply immaterial. They merely are reflective of, in this highly general language of, what is in the code anyway, and the rule for the Federal judges is adequately, I think, covered by the statutes and the cases and I don't think the canons really add anything other than a confirming note or echo.

Senator BAYH. Now, you discussed before us the most recent case in the field of ethics, handed down in the October term 1968, *Commonwealth Coatings* v. *Continental Casualty*. It would seem to me that the Supreme Court ruling on this would have more credibility as far

as what the law of the land is than the numerous appeal courts that have been quoted, if indeed we could agree on the facts being similar.

Mr. FRANK. Without doubt a Supreme Court opinion is more authoritative than a lower court opinion.

Senator BAYH. Now, you mentioned in discussing it that you didn't feel the facts were on point here. It seems to me from reading the case, and I perhaps would be advised just to read a couple of passages to refresh my memory. Maybe you don't need it, but maybe I ought to refresh my own memory:

Petitioner Commonwealth Coating Corporation, subcontractor, sues the sureties on the prime contractor's bond to recover money alleged to be due for a painting job. Contract for painting contained an agreement to arbitrate such controversy.

In the arbitration, as I recall, each litigant was to choose one arbitrator and then those two arbitrators were to choose a third. This third arbitrator was the reason for the petitioner's appeal to throw the case out and reverse it, and I quote here again:

One of his,

His being the third arbitrator.

Regular customers in this business was the prime contractor that the petitioner sued in this case. This relationship with the prime contractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals and there had been no dealings between them for about a year immediately preceding their arbitration.

It goes on to point out this relationship amounted to less than 1 percent of the arbitrator's total business. So it seems to me we have a sporadic relationship, we have a minimal financial interest involved here, and that this could indeed, in my judgment, be very much on point as far as the facts are concerned. We are talking about arbitrators instead of judges but I think if we look at the wording of the case, particularly Justice White's reference to article III judges, that there can be substantial opinion that they would hold judges to a higher standard than arbitrators.

Why is it that you don't feel that this case, which by the way for the record vacated the arbitration award, reversed it because of this arbitrator's sporadic slight interest with one of the litigants, is not applicable to judges?

Mr. FRANK. Senator Bayh, the factors are, that make me think that the case is not really controlling or terribly helpful here are these: No. 1, the case does involve arbitration. You allude to the passage by Justice White in which he refers to article II courts, but in the majority opinion there is also a passage by the majority of the Court which expressly notes that since arbitrators are the judges of the law as well as of the facts that a somewhat higher standard may indeed be required as to them.

Senator BAYH. May I interrupt long enough, I left out one fact which I think meets this higher standard. This wasn't a 3 to 2 judicial or arbitration decision. This was a unanimous decision in which both arbitrators chosen by the parties agreed, and the third arbitrator agreed with the arbitrators chosen by the parties, and it is that third arbitrator that is being questioned. Excuse me, I won't interrupt again.

Mr. FRANK. Well, it is obviously helpful.

The key factors, I think, which make it materially different from the instant matter are these: In the first place, what we are dealing with is an express rule of the American Arbitration Association which requires an arbitrator to make certain disclosures before he undertakes to hear a particular matter. This arbitrator didn't do it, and the reversal is in essence because he failed to make the disclosures he should have made.

Secondly, in this case the particular arbitrator was a person dealing with the party on a negotiated basis in which he was hired for personal services as an act of purely personal selection. In the instant case Vend-A-Matic is a company which is chosen by competitive bidding to perform a particular function.

In the fact that I think that this is truly and fundamentally different is best indicated by the suggestion made by Senator Ervin, whose answer I would adopt as my own, if I may, and that is the parties didn't think so at the time. In the *Coatings* case the losing party appealed because this disclosure had not been made. In the instant case, the Textile Workers Union was thoroughly acquainted with this matter before the thing ever went to the Supreme Court, as witness the fact that they had forwarded the complaint through Eames—I see my very respected friend Mr. Flug shaking his head, I may be wrong, he will tell me later if I am—but in any case in that matter it would have been perfectly possible for the parties to have raised it on a direct appeal as you suggested it, Senator, had they had a faintest supposition that this had any bearing on disqualification at all, and they not only didn't raise it on direct appeal, but they didn't raise it the next time the case was back there.

Senator BAYH. I want to come back to that because I think the timing of raising the issue of conflict of interest really doesn't have much to do with a judge's propriety in sitting on a case or not. Isn't this question something which ought to be decided before a judge sits on a case?

Mr. FRANK. Yes; absolutely, Senator. The illustration I gave was merely to indicate that the principles are wholly different and I use this as confirmation of that fact.

Senator BAYH. Isn't it also true that in the case that you displayed to us as a basis for the determination to sit, Judge Rives made this determination before the case was tried before him, not afterward, not on appeal, not after a secret phone call—this type of very undesirable thing that came up after the *Darlington* case.

Mr. FRANK. In Judge Rives' case the matter—technically what you say is almost right—the matter was heard twice by Judge Rives and this came up between the first and second time but in principle what you say is correct.

Senator BAYH. Now let me respectfully take issue with your reliance on the distinction being the fact that the American Arbitration Association rule was binding on this and that that makes a distinction. I quote from the case:

While not controlling in this case, Rule 18 of the American Arbitration Association is highly significant.

And then it proceeds to quote from section 18. I think it is important and the reason I hoped that you would rely at least to some degree

on the matter of the code of ethics itself is that the court said, as I just quoted, "that rule 18 of the American Arbitration Association is highly significant but not controlling," but goes on in Justice Black's opinion to say, "and based on the same principle as this Arbitration Association rule is that part of the 33d canon of judicial ethics which provides," and he quotes there, "that a judge should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relationship or friendships constitute an element in influencing his judgment. This rule of arbitration and this canon of judicial ethics rests on the premise that any tribunal permitted by law to try cases in controversy must not only be unbiased but must avoid even the appearance of bias."

Mr. FRANK. If that concludes with a question mark may I construe it as permitting me to say that those are wholesome principles which I join you in applauding.

Senator BAYH. Well, let us join the court and applaud them because this is why it seemed to me that this is a case very much on point, very much on point as far as this case is concerned. No one is saying, at least I am not saying that Judge Haynsworth did something wrong per se. But I am suggesting this sporadic relationship, this relatively insignificant interest which is greater than that in the *Coatings Corp.* case, is the same kind of relationship. It even relies on one of the judicial canons.

Mr. FRANK. Senator, it is perfectly possible that we may find some years from now *Coatings* started a new chapter on the law of disqualification. It could develop and spread over into courts and so on.

I think probably to have that effect it will need, almost certainly, work by your own subcommittee. You may make revisions in the rules, particularly in 455. If so you will have to modify the duty-to-sit rule. The difference between arbitration and judging is simply overwhelming in this regard. You can always get another arbitrator. The rules as to judges are couched in terms of the fact that the judge has a duty to go forward. The whole disclosure pattern is quite different and you may want to extend it from arbitrators to judges, but nobody has yet. Certainly no one had in 1963.

Senator BAYH. May I quote from two other passages and ask your opinion on the validity of those and perhaps a comparison with the present litigation.

But neither this arbitrator nor the prime contractor gave the petitioner even an intimation of the close financial relationship that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship the judge would be subject to challenge.

Mr. FRANK. Yes; I am well acquainted with the passage and have no question about it.

Senator BAYH. It goes on to quote from *Tumey*, the case that you relied upon, and it says:

Although in Tumey it appeared that the amount of the judge's compensation actually depended on whether he decided for one side or the other that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case, nor should it be at all relevant, as the Court of Appeals apparently

thought it was, that the payments received were a very small part of the arbitrator's income, for in Tumey the court held that a decision should be set aside where there is the slightest pecuniary interest on the part of the judge.

Mr. FRANK. Indeed it did.

Senator BAYH. I would make just this one observation, that it seems to me rather strange that the Justice Department brief, which was submitted to us, didn't mention *Tumey*, which has been a case which has been the landmark decision in the conflict-of-interest cases; and it also, incidentally, didn't mention the *Commonwealth Coatings* case in try to explain what the issues were.

I appreciate very much your patience. It is a very difficult problem and, as pointed out, it is not an exact science but we are glad to have your thoughts on it. You have studied it very thoroughly.

Mr. FRANK. Thank you, Senator.

Senator BAYH. May I ask just one other question. As you been very patient. Are you of the opinion, after my quoting from the *Commonwealth Coatings* case, as relying on canon No. 33, that we shouldn't consider the various ethics or the various canons? In their formal interpretation No. 89, the American Bar Association held, in interpreting canon No. 4, and I quote:

It is improper for an attorney to make a loan to a judge before whom he practices or for the judge to accept such a loan.

And formal opinion No. 170, and I quote again:

A judge who is a stockholder in a corporation which is apt to have litigation pending in his court may not with propriety perform any act in relation to such litigation involving the exercise of judicial discretion.

I am having a little trouble reading my own handwriting.

What are your thoughts about those two interpretations?

Mr. FRANK. Senator, I truly wish I could help. But you are giving me the privilege of appearing here as an actual expert and I have the duty of knowing in full depth what I am talking about.

Senator BAYH. We want your opinion whether or not it agrees with me.

Mr. FRANK. On that canon I simply do not know. On disqualification I have read all the cases or interpretations. On the law of disqualification I can fairly say I have exhausted the subject and can fairly answer questions. On that one I haven't. I don't know what the cases are and I simply fail you on that score.

Senator BAYH. Though I would be happy to have you agree with me, that is not your reason for being here.

The CHAIRMAN. Senator Burdick.

Senator BURDICK. Mr. Chairman, I have just one question.

The area of ethics has been fairly covered this afternoon. There is just one point here I would like to raise.

In 1957 Judge Haynsworth was a practicing lawyer and then was placed on the bench, and the case in question that we are talking about is the *Milliken* case which was heard in 1963.

Mr. FRANK. That is correct.

Senator BURDICK. There was a lapse of 6 years. Now, as I understand it in 1957 Judge Haynsworth's firm had represented a company by the name of Judson, and Judson was a subsidiary, I believe, of Milliken.

Mr. FRANK. Should I answer?

Senator BURDICK. My question is, Is that lapse of time or is the fact that the main party in interest was the Milliken Co. and that the judge was with a subsidiary, does that raise any question of interest?

Mr. FRANK. May I answer that first generally, Senator, and then specifically.

First, as a general matter, the question arises as to when a former representation has exhausted itself. When has it gotten sufficiently remote in time so that it doesn't matter; and that is, the statute expressly leaves that kind of thing to the discretion of the judge to a considerable extent. That is the meaning of the words "in his opinion" in section 455. That does not relate to interest but it does relate to the other ground of bias. And the statute says "If the person is so related or connected with a party as to render it improper in his opinion," and so on. So what judges commonly do is to decide for themselves when that is worn off; and a given judge, it will depend on how close the relation, how deeply involved he was and so on. In this particular case, there is a rather more important and special distinction, and that is that in the period of Judge Haynsworth's active representation of Judson, Deering Milliken had not owned it and after Deering Milliken bought it out they lost the representation for all except nominal purposes, as the judge testified this morning.

Senator BURDICK. Does the record show that Deering Milliken did not own a majority interest in Judson in 1957?

Mr. FRANK. It is my understanding of the matter—now, would you recheck this with Judge Haynsworth? I merely heard him say it—that the Haynsworth office represented Judson as their major counsel until Deering Milliken bought them out. When Deering Milliken bought them, I really don't know. After that time, what the judge said was that they had a nominal or purely local representation and that the weight of the thing went to whatever national law office Deering Milliken used.

Senator BURDICK. Assume for the purpose of the hypothetical now, assuming that Milliken did own 51 percent of the stock of Judson in 1957, would your answer be different?

Mr. FRANK. Right. Then the answer under the statute it would be a question for any judge in the United States, a case of time, to decide as to whether the degree of his connection was sufficiently slim and the passage of time sufficiently great and so on so that it was proper for him to sit, and that is left to the discretion of the judge by the statute and by the practice.

Senator BAYH. Excuse me, would the Senator yield?

Following this, is it your opinion that Deering Milliken did not own Judson?

Mr. FRANK. What——

Senator BAYH. Is that what you are basing your interpretation on?

Mr. FRANK. No, Senator Bayh, what I simply don't know is when Deering Milliken acquired Judson, nobody has told me and I have no idea. What I have been told, somewhere this morning, is that when Deering Milliken acquired Judson it changed the representation. Haynsworth's office lost the representation of Judson for all except nominal purposes according to his testimony. They had been home office counsel and it went somewhere else.

Senator BURDICK. Based on your experience as a teacher, and writer, and lawyer, would an ordinary case, would the lapse of 6 years be recent or not recent?

Mr. FRANK. Senator, it really depends upon the degree of intimacy of the judge in the particular matter. I don't know the nature of your own practice, sir, but if you hypothetically represent insurance companies that could wear off real quickly. If, on the other hand, you were home office counsel for a concern and were deeply involved in its affairs you might feel rather more in it.

I do not know of any detailed written analysis anywhere that breaks that down in terms of period of time. It is always put in the loose way that I put it because the situations vary so much.

Senator BURDICK. Thank you.

Senator ERVIN. As I understand it, this case involved in the arbitration was handed down in 1968 and would not have been available for that reason to anybody in 1963 for enlightenment on the subject.

Mr. FRANK. I suspect it came as rather a surprise.

Senator ERVIN. Now, I don't know what the law of arbitration was that was involved in that particular case. But it was my recollection that an arbitrator ordinarily is a judge of both the facts and the law and there is no appeal from them.

Mr. FRANK. That is correct.

Senator ERVIN. Yes. And so in the case of a circuit court passing on findings of the National Labor Relations Board, there is no power to find the facts. The only power is to ascertain whether the findings are supported by substantial evidence and the decision of the circuit court on the law is not final but, on the contrary, subject to appeal, is it not?

Mr. FRANK. Yes.

Senator ERVIN. Now, doesn't a lawyer ordinarily contract to use his legal talents and his legal industry in behalf of his clients and not to absorb their economic or philosophical views?

Mr. FRANK. Thank goodness, yes.

Senator ERVIN. Now, if we disqualify a lawyer for judicial appointment on the ground he has had some clients we would never get a judge of any kind, in the first place and, in the second place, we would never get a qualified judge, will we?

Mr. FRANK. It would be very difficult. You would be restricted to academic.

Senator ERVIN. Thank you very much.

The CHAIRMAN. I want to make an announcement. We will recess now until 8:30, at which time Senator Bayh is taking testimony of one witness, and we will reconvene then at 10:30 tomorrow morning.

Mr. FRANK. Senator, shall I understand that I am excused when Senator Thurmond finishes or do you want me back here?

The CHAIRMAN. When these Senators get through.

Mr. FRANK. Yes, I just didn't understand your ruling.

The CHAIRMAN. Yes.

Senator THURMOND. Mr. Frank, I want to thank you for coming here for this hearing. You are very nice to do it.

As I understand you have studied this matter carefully, you have gone into the facts of the situation, and you are an authority on the

question of ethics, you have written books, and you have been counsel in many cases, you are a practicing attorney as well as a law teacher, and from all of your experience you are convinced here that there is no violation of ethics, there is no violation of law, and nothing improper in what Judge Haynsworth has done?

Mr. FRANK. Senator, I have made a very strong statement, and if I am wrong I assume some witness will correct me.

What I have said is that so far as I know from a comprehensive review of all the cases, that there never has been a reported case of a Federal judge disqualifying himself under the circumstances asserted here. If there is such a case I do not know it. I would assume that if those who are critical of Judge Haynsworth have such a precedent they will bring it to your attention.

Senator THURMOND. And I understand you to say a few moments ago that it was your opinion that he had a duty to serve here and not disqualify himself under the circumstances of that particular case?

Mr. FRANK. Under the Federal rule he had no option whatsoever.

Senator THURMOND. Thank you very much.

(Whereupon, at 4:55 p.m. the committee recessed to reconvene at 8:30 p.m. of the same day.)

(The witness scheduled for 8:30 p.m. did not appear.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

THURSDAY, SEPTEMBER 18, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:50 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Hart, Kennedy, Bayh, Burdick, Tydings, Thurmond, Cook, and Mathias.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. Judge Walsh.

STATEMENT OF LAWRENCE E. WALSH, CHAIRMAN OF THE AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, ACCOMPANIED BY DAVID OWEN AND NORMAN RAMSEY

The CHAIRMAN. Identify yourself for the record, please, sir.

Judge WALSH. Yes, sir. Lawrence E. Walsh. I am chairman of the American Bar Association's Standing Committee on the Federal Judiciary.

The CHAIRMAN. Now, what positions have you held?

Judge WALSH. I have been admitted to the bar of New York since 1936 and the bar of the Supreme Court since 1950. I have been assistant district attorney and counsel to the Governor of New York, counsel to and director of the New York Waterfront Commission, New York Harbor. I have been a Federal judge and Deputy Attorney General of the United States.

The CHAIRMAN. You also now represent the United States in some negotiations in Paris, do you not?

Judge WALSH. Yes, sir. I am the personal representative of the President of the United States in the Vietnam meetings. I am inactive at the present but I was in Paris for 5 months and I will go back if there is more to be done.

The CHAIRMAN. You here represent the American Bar Association?

Judge WALSH. Yes, sir. That is my sole purpose for being here this morning.

The CHAIRMAN. You may proceed.

Judge WALSH. Thank you, sir.

The CHAIRMAN. Do you know Judge Haynsworth?

Judge WALSH. No, sir, I have never met him. The committee conducts its investigations through its members in the various circuits. The committee has 12 members, one for each circuit, and a chairman, and the members for the Fourth Circuit, who conducted this investigation are here today, Mr. Norman Ramsey of Baltimore and Mr. David Owen of Baltimore. Mr. Chairman, if you would like, they would be glad to come forward.

The CHAIRMAN. Yes. Let them come up.

Judge WALSH. The gentlemen on my left, Mr. Chairman, is Norman Ramsey, and on my right, Mr. David Owen.

Senator BAYH. Pardon me. Could we get that order again, please?

Judge WALSH. Norman Ramsey and David Owen. David Owen is his partner. They collaborated on this investigation.

Mr. Chairman, I have submitted a statement but I think I can summarize it.

(The prepared statement follows:)

My name is Lawrence E. Walsh. I am a member of the Bar of the Supreme Court of the United States and a partner in the firm of Davis Polk & Wardwell of New York. I am testifying today at the invitation of the Chairman of this Committee in my capacity as Chairman of the American Bar Association Standing Committee on the Federal Judiciary.

Our Committee was established many years ago and for the past 18 years it has at the request of the President of the United States or the Chairman of the Senate Judiciary Committee, reviewed the professional qualifications of persons under consideration for appointment to the United States Judiciary. It consists of twelve members appointed by the President of the Association, one from each circuit, and a Chairman appointed at large.

At the request of Chairman Eastland, we have examined into the professional qualifications of Chief Judge Clement F. Haynsworth. Our investigation has consisted of interviews with his judicial colleagues, interviews with a cross-section of district judges and lawyers practicing in the Fourth Circuit and an interview with Judge Haynsworth himself.

These interviews were conducted by Norman P. Ramsey of Baltimore, the Committee member of the Fourth Circuit and his partner, David R. Owen. I also made certain inquiries of my own. The members of the bar from whom comments were received included lawyers from each state in the Circuit and lawyers having different specialties. For example some customarily represent plaintiffs in personal injury cases. Others represent defendants. Two were deans of law schools. Two represent labor unions. One specializes in admiralty work for shipowners, another represents seamen and longshoremen. Two are outstanding Negro lawyers. Others include a past president of the American Bar Association and three members of the Council of the American Law Institute. A sincere effort was made to get candid reports from a representative sample of the bar.

All of the persons interviewed regarding Judge Haynsworth expressed confidence in his integrity, his intellectual honesty, his judicial temperament and his professional ability. A few regretted the appointment because of differences with Judge Haynsworth's ideological point of view, preferring someone less conservative. None of these gentlemen, however, expressed any doubts as to Judge Haynsworth's intellectual integrity or his capability as a jurist.

A survey of Judge Haynsworth's opinions confirmed the views expressed by those interviewed as to the professional quality of his work. As is its practice, the Committee does not express either agreement or disagreement as to the various points of view contained in Judge Haynsworth's opinions.

On September 5, our Committee met in New York to receive these reports and evaluate Judge Haynsworth's qualifications. The members of the Committee were unanimously of the opinion that Judge Haynsworth was highly acceptable from the viewpoint of professional qualification.

The Committee also considered the suggestion which has been circulated that Judge Haynsworth had, on one occasion, failed to disqualify himself in a

case in which he was alleged to have had a conflict of interest. Our examination into that case (*Darlington Manufacturing Company* v. *NLRB*, 325 F. 2d 682) satisfied us that there was no conflict of interest and that Judge Haynsworth acted properly in sitting as a judge participating in its decision.

Briefly stated, Judge Haynsworth held a one-seventh interest in Carolina Vend-A-Matic Company, an automatic vending machine company which had installed machines in a substantial number of industrial plants in South Carolina. Among the plants which it serviced were three of twenty-seven owned in whole or in part by the Deering-Milliken Company which was a party to the proceeding before Judge Haynsworth's court. The annual gross revenues from the sales in the Deering-Milliken plants were less than 3% of the total sales of Carolina Vend-A-Matic. The plant involved in the case before the court was not one serviced by Carolina Vend-A-Matic. Judge Haynsworth had no interest, direct or indirect, in the outcome of the case before his court. There was no basis for any claim of disqualification and it was his duty to sit as a member of his court.

Having found no impropriety in his conduct, and being unanimously of the opiuion that Judge Haynsworth is qualified professionally, our Committee has authorized me to express these views in support of his nomination as Associate Justice of the Supreme Court of the United States.

Judge WALSH. The committee has for many years at the request of either the Attorney General or the chairman of this Judiciary Committee evaluated the professional qualifications of persons under consideration for Federal judgeships. In this particular case the request came from you, sir, as chairman of this committee. After receiving that request, we proceeded in four ways. We had a survey made of Judge Haynsworth's opinions. Through Mr. Ramsey and Mr. Owens, we interviewed every member of his court, the Fourth Circuit of Appeals, except one who is abroad. We also, through Mr. Ramsey and Mr. Owens, interviewed a number of district judges and a number of practicing lawyers. They selected the lawyers to try to get a fair sample of the bar throughout the circuit. They interviewed lawyers from each State in the circuit. They interviewed lawyers who frequently represent defendants, lawyers who frequently represent plaintiffs, lawyers who represent labor unions, and lawyers who are in the Admiralty Bar, lawyers on both sides who sometimes are plaintiffs and defendants in that bar. I also knew a number of lawyers and judges in this circuit and I personally talked with them.

I think I can summarize the investigation this way. As far as Judge Haynsworth's opinions are concerned, he has written more than 300. Probably 90 percent of them are not controversial in any way. He has participated in many, many more, probably well over 1,000, but looking to the 10 percent of his opinions which were in areas which inevitably would invite controversy, we can see that in those areas where the Supreme Court is perhaps moving the most rapidly in breaking new ground he has tended to favor allowing time to pass in following up or in any way expanding these new precedents.

The areas in which you might notice this would be in the areas of civil rights but also in the areas perhaps of labor law and in the areas of the rights of, for example, seamen and longshoremen. The Supreme Court has greatly expanded the old definitions of seaworthiness and things like that. In all of these areas, whether they are politically sensitive or not, you see the same intellectual approach.

It was our conclusion, after looking through these cases, that this was in no way a reflection of bias. This was a reflection of a man who

has a concept of deliberateness in the judicial process and that his opinions were scholarly, well written, and that he was, therefore, professionally qualified for this post for which he is being considered.

Incidentally, in reporting to this committee for the lower courts, we usually express our qualfications without limitation. When we report on a person under consideration for the Supreme Court, we realize that professional qualification is only one of many factors that has to be considered in this case. The Supreme Court has such broad responsibilities that there are many things that must go into selection besides professional qualification. It is only for that reason that we limit our endorsement to professional qualification. We feel that it is beyond the scope of our committee to go into these other factors, so we do not express any view as to the points of view expressed by Judge Haynsworth, for example. All we say is that they are within the limits of good professional thinking.

Then the interviews which were conducted support completely the analysis which we had reached ourselves. Each member of his court and each member of the bar who was interviewed supported this general evaluation. I think it was Senator Tydings who posed the three questions which must be considered at this time: first, integrity, second, judicial temperament, and third, professional ability. As far as integrity is concerned, it is the unvarying, unequivocal and emphatic view of each judge and lawyer interviewed that Judge Haynsworth is, beyond any reservation, a man of impeccable integrity. His word is good. His handling of himself in judicial matters——

The CHAIRMAN. Did you consider, go into, the Carolina Vend-A-Matic matter?

Judge WALSH. Yes, sir; we did, because we felt we could not report here without going into that, and so we again had a study of the law made for us. It came out exactly the way Mr. Frank testified yesterday. We believe that there was no conflict of interest in the *Darlington* case which would have barred Judge Haynsworth from sitting and we also concluded that it was his duty to sit.

The problem of conflicts—I will not repeat Mr. Frank's testimony—is that once you get beyond the line of direct substantial interest in the outcome of a case, is not a doctrine in which we can conjure up speculative possibilities of conflict as a basis for the disqualification of a Federal judge.

I would like to say, with respect to that, that yesterday there was some mention of an arbitrator. Well, when you are selecting arbitrators from a panel you have a great range of choice. There is no reason for taking one who has had any relations with the parties. But when you come before a Federal district judge who is responsible for the trial of cases in his district, he cannot start conjuring up reasons for not sitting. There are alternatives where the district judge has an interest. You can get a judge from another district, which is undesirable, but you can do it, but when you get to an appellate court you have got a panel of judges who day in and day out are supposed to be interpreting the law in harmony for a particular circuit. When you take one man out, then you are dealing with less than the full unit. This is particularly true in an en banc proceeding where the matter is of such gravity and public importance that the entire court sits. For

example, if the Fourth Circuit, if you have five judges, they would ordinarily sit in panels of three. Where the views of each judge are important and it is important that the law not be made by a panel of three in this case and a different panel of three in another case, but where they wanted all five, then it is particularly difficult, I think, for a judge to disqualify himself because it defeats the purpose of the en banc proceeding. So, for all of those reasons we concluded there was no problem of conflict, no impropriety in his sitting.

Going to judicial temperament, we found he is extremely popular in the circuit. He is well liked by the lawyers who appear before him. He is patient. He hears them well and gives them a full chance to develop their points of view. When he makes up his mind, he is firm, which again they like.

As far as his professional qualification is concerned, he is spoken of in the highest terms. I do not think we ever quite put it in this way but among the lawyers in his circuit and the district judges, certainly those that we talked to in the circuit, in terms of professional qualification, they will put him right at the top of those who would be eligible for consideration for this post from that circuit.

Now, there are reservations as to his, some of his particular points of view. I mean, there were lawyers who will differ. Some will wish that he would lean more toward plaintiffs in personal injury cases, for example, or that he was perhaps for faster progress in civil rights cases or more oriented toward labor in labor cases. They will say that and they will say because of this they wish the President had picked someone else. This is a minority of the group that we talked to but even they, and this I thought was the real test as far as our job was concerned, they conceded his professional qualifications and they conceded his intellectual integrity and they conceded his personal integrity and they like him as a man.

Now, I knew a number of district judges and, in fact, I had gone through some civil rights matters with some of them, and so I talked to them myself and they spoke in highest terms of Judge Haynsworth. I mean, whether or not they agree with particular points of view, they support him fully, as a man and as an honest man, a man of integrity.

Beyond that he has been an excellent chief judge, he has been a good administrator, a fair administrator, and you sense an enthusiasm from the district judges as you talk to them in his district.

I think that perhaps is a fair summary of what we found, Mr. Chairman.

The CHAIRMAN. Senator Ervin?

Senator ERVIN. Senator Tydings is holding another hearing. He asked me to yield temporarily and I will be glad to do that.

Senator TYDINGS. Thank you, Senator Ervin. I would like to direct my questions to Mr. Ramsey who is a distinguished lawyer from my own State, as is Mr. Owens. Mr. Ramsey, how long have you been trying cases before the fourth circuit?

Mr. RAMSEY. I would say, sir, since roughly 1949, and before Judge Haynsworth since he went on the bench, sir.

Senator TYDINGS. And you have been active in bar association activities in our State at the junior bar level, the Baltimore City bar level,

and the State bar level almost since you have been a member of the bar?

Mr. RAMSEY. Yes, sir.

Senator TYDINGS. Do you know of any lawyer who is from Maryland who has ever argued a case before a fourth circuit panel, a panel on which Judge Haynsworth sat, who felt he was not fair and impartial, and that he was not a good judge, even if the opinion or panel ruled against him?

Mr. RAMSEY. I have never heard that comment made. I have lost a few myself and obviously I did not agree with the court on ones I lost but I never felt it was in any way due to any bias, prejudice or improper conduct on Judge Haynsworth.

Senator ERVIN. Concerning lost cases, I think there is an old couplet: "Now wretch e'er felt the halter draw with good opinion of the law."

Mr. RAMSEY. I have never heard, sir, any adverse comments on Judge Haynsworth during his tenure on the bench.

Senator TYDINGS. Would it be a fair statement to say that not just the great weight but the overwhelming opinion of the lawyers of Maryland who have had any contact, direct or indirect, with Judge Haynsworth would be that he, regardless of his political philosophy or political allegiance or political registration, is competent and qualified to be a Justice of the Supreme Court?

Mr. RAMSEY. I believe that is correct, sir, and I think our State bar association has advised the chairman of the committee that in the opinion of the board of governors of our association, he is eminently well qualified to be a member of the Supreme Court and in addition, I would concur that I think that is unvaryingly the opinion of our board.

Senator TYDINGS. Just one aside. The most important case I ever tried as an attorney, Judge Haynsworth ruled against me on appeal. [Laughter.]

Senator BAYH. That is just another example of the stellar character of our colleague from Maryland.

Senator TYDINGS. I thank my distinguished colleague and I thank my colleague from North Carolina.

Senator ERVIN. You spoke of the fact that some lawyers did not agree with Judge Haynsworth in some of his points of view and in some of his decisions. I would just like to make a confession on that point on my own behalf. I have never found any other human being on this earth who shares my sound views on all questions. [Laughter.]

Judge, did you have an occasion to read Judge Bryan's opinion, Judge Bell's opinion in the case that was tried or heard with them in 1963——

Judge WALSH. Yes, sir. I did. The *Darlington* case.

Senator ERVIN. Now, the evidence before the committee is that Judge Haynsworth participated in three decisions regarding the *Darlington* case. The first being in 1961 where it involved the question as to whether or not the National Labor Relations Board had failed in its statutory duty to decide the *Darlington* case within a reasonable period of time, and certainly there can be no charge that anything occurred in that connection which showed any bias by Judge Hayns-

worth in favor of Deering-Milliken and against the unions. This is true because Judge Haynsworth wrote the opinion in that case and sustained the union's motion, rather, sustained the ruling of the National Labor Relations Board remanding the case for further evidence before the trial examiner.

Judge WALSH. He reversed the district judge's injunction, yes, sir.

Senator ERVIN. And the district court had issued an injunction which completely banned any hearing on the remand to the trial examiner which had been ordered by the National Labor Relations Board.

Judge WALSH. Yes.

Senator ERVIN. Now, going to the last case, the one that was heard, I think, in 1967 and handed down in 1968, Judge Haynsworth on that occasion joined four of the other judges in voting and also wrote the opinion in favor of the union and against Derring-Milliken; did he not?

Judge WALSH. Yes, sir.

Senator ERVIN. So there can be no complaints that he displayed any bias toward unions in that case.

Now, to go back to the 1963 case, you had a majority opinion in that case written by Judge Bryan who, incidentally, is one of the finest circuit judges that this country has ever known, and it was concurred in by Judge Bowman and Judge Haynsworth, and then you had a dissenting opinion written by Judge Bell, which was concurred in by Judge Sobeloff. Now, the only legal result of that 1963 case was, leaving aside the verbiage that is used in opinions, that the majority of the circuit court, the 3-to-2 majority, in which Judge Haynsworth concurred, held that on the record which came to them from the National Labor Relations Board, the circuit court was without power to endorse the decision of the National Lahor Relations Board against Deering-Milliken chain—if it was a chain.

Now, that case was a case of grave importance both as to the money involved and as to the legal issues involved. In fact, I think it is certain that whichever side lost would have appealed the case to the Supreme Court. And so if Judge Haynsworth had concurred with Judges Bell or Sobeloff, the case would undoubtedly have been appealed, and if he had disqualified himself and they split 2 to 2, the case would undoubtedly have been appealed.

Judge WALSH. Correct.

Senator ERVIN. And it was appealed although this was a 3-to-2 decision.

Now, I will ask you if as a practical matter the Supreme Court of the United States when it considered the case on appeal did not reach the same conclusion on slightly different grounds that the majority of the circuit court had reached; namely, that on the record that had been made before the National Labor Relations Board the court did not have the power to endorse the decree of the National Labor Relations Board because the National Labor Relations Board had not determined certain issues of fact and certain issues of law which were essential to a decision of the case?

Judge WALSH. That is correct, sir.

Senator ERVIN. Now, the National Labor Relations Board had felt in effect that regardless of whether or not the Darlington Mill was a

separate legal entity or a single employer with Deering-Milliken that it had committed an unfair labor practice by going completely out of business?

Judge WALSH. Right.

Senator ERVIN. And the Supreme Court held that if Darlington were a single employer, then it had had an absolute right to go completely and permanently out of business for any reason satisfactory to it including union animosity?

Judge WALSH. Yes, sir.

Senator ERVIN. So is it very difficult on the facts of this case to deduce that Judge Haynsworth did anything in connection with the *Darlington* case which displayed any bias toward anybody or any incapacity to hold the scales of justice even?

Judge WALSH. I think that is so, sir. I do not even understand that the opponents claimed he displayed any bias. In fact, I think the only question is one of appearance, whether on abstract grounds he should have disqualified himself and it is our conclusion he should not.

Senator ERVIN. Yes. And I told Judge Haynsworth if he did show any bias in favor of Deering-Milliken, in plain North Carolina language, he surely had a poor way to show it because he decided in favor of the union and against Deering-Milliken.

That is all.

Senator KENNEDY. Judge Walsh, I want to welcome you and your associates before the committee, and express our appreciation for your appearance and also for your comments and your high recommendations of the candidate for the Supreme Court.

I am just wondering, in your own considerations of the qualifications of the candidate for the Supreme Court, do you make any, or attempt to make any, kind of evaluation as to whether the candidate is a contemporary man of the times, whether he has a real kind of appreciation for the various forces or factors which are relevant in a rapidly moving society? Do you place any kind of emphasis on this, apart from the areas which you mentioned here in your brief statement in terms of integrity and judicial temperament and professional qualifications?

Judge WALSH. Senator, only to this extent. If we felt that a person were so biased that he were incapable of functioning as an objective lawyer, then we would say he was disqualified. On the other hand, if we disagree with his views, political, sociological, or otherwise, we would not regard that as a factor for us. We think that once a man is qualified professionally, these other matters are for the President to be selective about, and, secondarily, perhaps for this committee, for the Senate Judiciary Committee, to consider, but it is not for us. Factors such as those you mentioned would be necessarily subjective and I do not even know how my committee would respond on that because we are drawn from all over the country, from different types of practices.

Senator KENNEDY. So really, the standards which you applied in terms of your evaluation, just by your own comment, would be by definition of responsibility different from what the Senate itself should apply?

Judge WALSH. Well, I would not presume to suggest what standards the Senate should apply. It would seem to me in the first instance the question is one for the President and that—in trying to respond to the

question which you put as to the Senate's position, I have observed that over the years it always seemed to me if the man picked by the President is a man of integrity and good qualification, in the absence of some very unusual factor, the Senate would ratify the choice of the President.

Senator KENNEDY. If you found a candidate that, say, met the criteria in terms of personal integrity, and had a high degree of competence and understanding of the law, and was professionally highly regarded in his community, and yet you were to make a judgment that his decisions were perhaps running against the general stream of the law, even though a reasonable man would not reach the conclusion that in any way he was biased or prejudiced would this enter into your recommendation or would you still hold to the three criteria which you and Senator Tydings have talked to?

Judge WALSH. Senator, I was just sort of pondering over the phrase running against the stream of the law because——

Senator KENNEDY. I do not know whether you had a chance to view or see the record. I think perhaps the inclusion of the major cases which Judge Haynsworth commented on or wrote and which Senator Hart introduced in the record yesterday, which were overturned or overruled for a variety of reasons, and I am not so much interested in the discussion of any one of those cases but more of an overview, is this a matter of importance and how do you weigh that?

Judge WALSH. I think when a man is under consideration for the Supreme Court, of course, the opinions he has written are matters of importance, and I think the distinction that you may be working toward is the difference between running against the stream of the law and running with the stream of the law at a slower pace than perhaps some others.

Now, I do not mean in any way to suggest that I thought Judge Haynsworth was running against the stream of the law. I think he was punctilious in following that stream as the Supreme Court laid it out and in some fields he has run ahead and broken new grounds. For example, in the expansion of the doctrine of the utility of habeas corpus, he broke away from an old restraint in earlier Supreme Court opinions and was complimented by the present Supreme Court for doing so. He has moved over into, as I recall it, more modern tests on insanity, things like that. So, he is in no sense running against the stream of the law. If I were going to characterize it, I would say where new ground is being broken by the Supreme Court, he believes in moving deliberately rather than rapidly, and particularly where an interpretation of the Constitution which has stood for many years is reversed or turned around he would perhaps give more time than other judges to adjust to the new state of affairs.

Now, I say those of us, depending on our respective points of view, would each differ perhaps as to the amount of time he would give and the amount of time another judge would give. One we might say, moves too rapidly, the other too slow. I would also like to say this, that some people, some judges, old judges that I knew, would say that it takes 5 or 10 years to make a judge. District judges come into their posts with their own predispositions, which they try to set aside, but as they start work, they still have those earlier—their activities

reflect their earlier training. But after they have worked in a Federal court for a while and dealt with the great range of issues which come before it and after they have been reversed a few times, they begin to adjust and take a view which becomes increasingly in conformity with the stream of the law as the Federal system is developed. And I think if you compare Judge Haynsworth's opinions in his first 5 years on the bench with those in the last 5, the period since he has been chief judge, you can see that process working there.

The judges of the appellate courts work on each other as abrasives and they keep rounding off each other's personal views until each becomes more in conformity with the others. I think if you look over Judge Haynsworth's opinions for the last 5 years, you will find one reversal in the Supreme Court, just one, and there were two other cases where decisions of his court were vacated, opinions which he wrote, but that was because after he wrote his opinion the Supreme Court decided another case in a different way and the Supreme Court remanded the case back to his court for consideration in the light of its most recent determination. So I would not in any way like to leave the idea that I thought Judge Haynsworth was running counter to the stream of the law.

Senator KENNEDY. How do you see the Supreme Court as an institution within our society for social change?

Judge WALSH. Well, it is a very unique institution, of course. It has all the judicial power of an ordinary court and this broad ranging power of interpreting the Constitution which could be characterized in a number of ways, but the breadth and the unlimited—its dependence on its own self-limitations gives it a broad basis for action. It has the job of reconciling our Constitution with the changing courses of our history. I guess to put it in a few words, that is what I would say its job is.

Senator KENNEDY. I would agree with that interpretation. But in evaluating the changing course of our history, do you think it is appropriate for us to ask a nominee, particularly given the kinds of distress and contention and emotions that we have seen in this country at this time, about his view about these changing courses in history?

Judge WALSH. I think the difficulty which comes from that is that it leads him into a possible prejudgment of matters which will come before him and the matters that come before the Supreme Court are of such wide scope that it is impossible to tell how a statement made here will affect some later decision. Again, from my observation, although at times Senator Ervin has, I think, had a different view, that it seemed to me that generally this committee has not compelled a potential judicial nominee——

Senator ERVIN. I do not have a different view. My view was that you can ascertain a man's constitutional philosophy from the opinions he has written. I do not think any judge ought to ever be asked a question concerning what he is going to decide in a certain case. I think any man that would announce in advance what his decision is going to be when he has not seen the evidence or the record, is not fit to be a third rate justice of the peace much less a member of the Supreme Court of the United States.

Judge WALSH. I think that sort of poses a question and I have been here the last few days and I have heard your questions yesterday and

I understand the dilemma in your mind and I do not know how to resolve it.

Senator KENNEDY. Certainly, the thrust of those could not in any way, with the wildest kinds of interpretation, be seen as asking the nominee to prejudge himself in any positions that would be taking. They were at least an attempt to give an opportunity for the judge to express some observations, some concern, in the broadest kinds of social and philosophical areas, about what is happening in this country. There are those who view the judiciary, the Supreme Court, as one of the real last bastions for justice and for change, and if we are attempting to try to instill in our citizens some degree of confidence and understanding in our institutions, it is my feeling that those who are going to be making rulings and deciding cases which so dramatically affect policy, that they ought to at least have some views or express some attitudes on these questions.

Now, maybe we would not agree with them. Maybe we would find sharp disagreement. But I personally would find it most helpful if at least we had some expression of a view on what, as you said so eloquently yourself, the changing courses of history are and the applicability of the Constitution to those changes.

Judge WALSH. I think, Senator, really the test of a judicial nominee would be the same as a test for a judge. If a judge should not express a view on a particular subject, probably a judicial nominee should not either, because he is under the same strictures as a judge would be and I am sure this committee would not in any way want to reduce his usefulness as a member of the court to deal freely with the issues as he saw them.

Senator KENNEDY. I am surprised really, quite frankly, that your response is conditioned to the fact that you believe the thrust of my question is to make a comment on either any case or suggested case that might come before the Supreme Court, rather than just an expression of what is really happening in this country. As I understand what you have just expressed yourself, Judge Walsh, is that what we are really talking about is the application of the Constitution to the changing course of history. Those are your words.

Judge WALSH. Senator, I did not——

Senator KENNEDY. And I think it is not unreasonable for us to ask the nominee what he believes some of these changes in the course of history are.

Judge WALSH. I think, Senator, I did not mean to suggest that you were going to inquire about a particular case and again, if the question——

Senator KENNEDY. Well, do you feel—I would be interested, is that an unreasonable question?

Judge WALSH. If you get over in a discussion of history perhaps, fine. But let me give an illustration which is perhaps the best way for me to take my point.

I would not like to see a judicial nominee get into a discussion of seaworthiness. I am trying to think of a subject——

Senator KENNEDY. Of what?

Judge WALSH (continuing). Seaworthiness, an absolutely nonpolitical subject, but the court is going to deal with that issue and I would

not want him to start telling you what he thought was the limit of that definition. The same is true if we come to criminal procedures, I would not want him to get into a discussion of confessions and tell you what he thought was the proper role of a confession in a criminal case. Those are the things I think can be damaging.

Senator KENNEDY. Now, would it be fair to ask him a bit about what he has observed about the attitudes of the young people and their frustrations as they face our society? Why he believes that there is the frustration, as well, in terms of our own institutions, among certain groups with our society?

Judge WALSH. Well——

Senator KENNEDY. Is it possible to elicit from him some expressions of general philosophy in terms of how he might approach a question of applying the law?

Judge WALSH. I think, Senator, once you get into how he might approach a question we are beginning to get over the line. That would be my—I think it is hard to answer your question in the abstract without a question before me.

Senator KENNEDY. What do you think is an appropriate line of inquiry in this area?

Judge WALSH. Well, it seems to me that this committee has been doing a pretty thorough job so far.

[Laughter.]

We have gone through his opinions. We have gone into the question of such alleged conflicts of interests as he may have, and now you are going into his reputation, at least, as a lawyer and a judge. It seems to me that anything a man has done is fairly within the range of inquiry, but getting into his speculative views as to something as vague and difficult to pin down as the causes of present feelings by young people, which I heard him say yesterday he regards with gravity and concern, and interest, and recognizes the importance of it—I mean, when you start to ask him as to his views as to the causes of these things, it seems that you are inviting him to speculate on matters as to which most of us cannot give an answer without a great deal of preparation, and it ends up in a speculative discussion which is not going to reveal very much, and might in some way embarrass a judge if he is going to serve as a judge in the future.

Senator KENNEDY. Would it be fair to ask him whether he thinks the Constitution needs amending?

Judge WALSH. I think that would probably be undesirable to ask him. I am just trying to respond to your questions. I am slow to express any view as to what this committee should do or you should do. It seems to me his views as to the need for amendment might in some way embarrass him in a future opinion which he would have to write.

Senator KENNEDY. Certainly, other judges have expressed themselves on that question.

Judge WALSH. You are asking me what I thought. I do not think judges should, in the posture of a man going on the Supreme Court before he has worked there, before he has really gotten to work on the use of the powers of that great Court as it now is, should be led into a discussion of the need of amendments.

Senator KENNEDY. Could we ask him whether he views the Constitution as a living document or——

Judge WALSH. I am sure his answer would be yes.

Senator KENNEDY. Is that an appropriate question?

Judge WALSH. Excuse me?

Senator KENNEDY. Is that an appropriate question?

Judge WALSH. Well, again, I do not mean to cavil, but if it means what we all think you mean by it, it is a harmless question and I am sure that any lawyer——

Senator KENNEDY. It is a harmless question?

Judge WALSH (continuing). Regards this as——

Senator ERVIN. I submit if the Constitution is a living document it is bounded on the judge who has taken an oath to support it. Chief Justice John Marshall declared in *Marbury* v. *Madison* that judges should accept the Constitution as a rule for their official action.

Judge WALSH. Well, I think that he would disagree with that, too. [Laughter.]

Senator BAYH. Mr. Walsh, Mr. Owens, and Mr. Ramsey, I share the gratitude expressed by others on the committee for your willingness to take the time to be with us.

Senator Tydings spoke of the expertise of his two learned constituents from Maryland and, of course, goes along with the responsibility placed on your shoulders right now to try to help us in this situation to maintain some substance of responsibility as well. I noticed that you have served as Assistant Attorney General under former Attorney General Rogers.

Judge WALSH. Deputy Attorney General.

Senator BAYH. And you have also served under Attorney General Brownell?

Judge WALSH. I never served under Attorney General Brownell. I know him very well, but never worked with him.

Senator BAYH. He was very helpful to this committee.

Judge WALSH. He was president of the Association of the Bar of the City of New York after serving as Attorney General.

Senator BAYH. You mentioned that in your investigation you found that our prospective nominee, Judge Haynsworth, was well liked by his firm, highly respected by the members with whom he practiced and those who practice with him as judges. I firmly hope that the investigation of this committee will substantiate your report because, as I said earlier, this whole business cannot help but be extremely difficult on anyone, particularly when this man is sitting as an appeals court judge and has been proposed as a Supreme Court Judge and I think we have an obligation one way or the other to clear the air.

Judge WALSH. As a matter of fact, as I undertsand it, he would like you to.

Senator BAYH. Yes. Now, let me touch on a few areas here. As I say, in my relatively short tenure in the Senate, it has been my good fortune to work with the American Bar Association in my capacity as chairman of the Subcommittee on Constitutional Amendments. We have a uniquely close relationship on two issues, the first of which was the 25th amendment which in my judgment would not have been passed had it not been for their assistance, not only in the formulation of the amendment but ultimately actually pursuing it to the grassroots and getting it ratified by the State legislatures. We would not have been

successful if the bar had not been a part of this and, of course, the proposed 26th amendment, which I suppose almost at this hour may be receiving final deliberation in the House. The American Bar Association has been deeply involved and I am hopeful that we will have the same success in dealing with this problem of electoral reform.

So, I respect the bar. As a neophite member of it and as one who has had a chance to see it work and accept what I feel is the bar's high standard of responsibility to deal with the law, not only from the professional standpoint, but as it affects onr Government and society. So, I think your decision adds significant weight.

Wherein did you reach this decision?

Judge WALSH. The recommendation of the committee was reached on September 5 at a meeting of the committee in New York.

Senator BAYH. When did the investigation that you have disclosed, start?

Judge WALSH. The investigation started, I would say, some 10 days earlier, shortly after we received the telegram from this committee.

Senator BAYH. So, the investigation covered a period of about 10 days?

Judge WALSH. Mr. Owen says the 19th of August. So, I underestimated the time.

Senator BAYH. You mentioned that you had not met the judge?

Judge WALSH. That is right, sir. Mr. Ramsey and Mr. Owens have.

Senator BAYH. In this investigation, you did not discuss this situation with him. I trust——

Judge WALSH. Mr. Ramsey and Mr. Owen had a lengthy discussion with him but I did not.

Senator BAYH. You did discuss it with the judge?

Mr. RAMSEY. Yes, for roughly 2 hours, 20 minutes.

Senator BAYH. The reason I ask the question on the time is not to be picayune but because as this hearing has progressed there have been allegations made since the 5th of September——

Judge WALSH. I would say the investigation did not cease on the 5th. The decision of the committee was made at that time subject to further investigation and at that time Mr. Ramsey and Mr. Owen continued and I think they actually talked with Judge Haynsworth after the meeting.

Senator BAYH. What I am trying to get at is that in any process of determination, if the committee meets and makes its decision, I would suppose that facts that occur after that, unless the committee meets again and makes another decision, are not considered; is that not fair?

Judge WALSH. No. That is not quite so. The committee met and made its decision. It asked that certain matters be discussed with Judge Haynsworth and its decision would stand if the answers were in accordance with those which it anticipated would be made.

After the committee adjourned, I kept them informed. They received a further report from Mr. Ramsey and Mr. Owen and actually, the statement which I sent down here was cleared with the full committee by mail before I brought it down here.

Senator BAYH. Had this very difficult situation—ethics—had that been raised prior to the decision?

Judge WALSH. Yes, it had. It had been in the press and our investigation in that respect had been really based on the records of this committee. We have reviewed everything that has come before the committee and it is on the basis of that that we reached the conclusion that we did.

Senator BAYH. You sought out and obtained knowledge concerning his personal and business relationships?

Judge WALSH. We relied primarily on the information which he himself supplied to this committee supplemented by this interview.

Senator BAYH. The committee just wanted to pin this down more specifically. As far as his present holdings, you were aware of the list of stock holdings that he submitted to this committee?

Judge WALSH. Yes, we are.

Senator BAYH. You are aware of the fact that the Burlington Mills, Dan Rivers, J. P. Stevens, and Southern Weaving Co.——

Judge WALSH. Yes, sir.

Senator BAYH. And the degree?

Judge WALSH. We are aware of the schedule which he supplied.

Senator BAYH. That is fine. I ask these questions here again not to try to pursue a leading point but I do not take the recommendations of the bar lightly and I wanted to make certain I am aware of the full implications.

Judge WALSH. I appreciate your——

Senator BAYH. You mentioned you were aware of the Carolina Vend-A-Matic problem?

Judge WALSH. Yes, sir.

Senator BAYH. Were you aware of the information which, to my knowledge, was brought out only yesterday in the discussion with Judge Haynsworth? I went down the 46 firms that did business with Carolina, and at least 30—just from glancing at it, I will not want to be held to that—of these firms were textile related firms?

Judge WALSH. We had assumed that to be true because of the nature of the industry around Greenville. We assumed, not knowing the exact number, that roughly two-thirds or a half would in all probability be textile firms and, as I expected, it was developed that about three-quarters of them are.

Senator BAYH. Thank you. It would seem to me that this information might have added some significance as to the amount of interest involved, as far as the judge's holdings. And I am concerned about it. But inasmuch as you refer in your statement to the annual gross revenues from the sales of Deering-Milliken's plant for less than 3 percent, total sales of Carolina Vend-A-Matic Corp., inasmuch as it appears that the great majority of the Carolina Vend-A-Matic business was with industries directly related to the textile industry and directly affected by the Deering-Milliken case involving the Darlington plant this might, indeed, take a different point of view.

Judge WALSH. I do not really think that goes to the question. I understand the point you are making but I do not think it is anything to be resolved by disqualification of a judge in the case or I do not think he can disqualify himself on the basis you suggest.

Senator BAYH. It is fair to say that if we are talking about a substantial interest in a case which I want to deal with here in a moment

and secure your thoughts on that, but if we are dealing with a substantial interest, that 3 percent interest in the firm, and 60 or 70 or 80 percent in a firm doing business with an interest firm has a different weight of responsibility, does it not?

Judge WALSH. I think regardless of the volume of business done by Carolina Vend-A-Matic with the textile business, the decision in this case had no bearing on Carolina Vend-A-Matic's interest. I mean, the ability of a plan to go out of business or not would not have any effect on Carolina Vend-A-Matic.

Senator BAYH. Did or did not the decision in this case have a decided impact on the textile industry? Before you answer, I would suggest that perhaps you should read the very eloquent colloquy in which the Senator from North Carolina gave us some specific information as to the impact that this indeed did have on the textile industry.

Judge WALSH. Well, I would yield to anything that Senator Ervin said on that question, but——

Senator ERVIN. I tried to make it very clear that the decisions in this case were not some kind of isolated law that applied only to the texitle industry. They apply to every industry of every kind in the United States where the industry had any effect on interstate commerce. It covered the whole thing just like the dew.

Senator BAYH. Just about like the dew.

Senator ERVIN. Steel mills, everything else.

Senator BAYH. I do believe that yesterday a quotation that has been discussed—attributed to the New York Times—was a bit more specific about the textile industry, but let us not ride that to death.

Senator ERVIN. The quotation you had said that freedom rode on that decision and it did, because if the National Labor Relations Board position had stood, a man could not go out of the business permanently and completely for any reason, including union bias. If this had become the law, virtually everybody in the United States who had been in business would have been placed in the state of slavery and subjection.

Senator BAYH. The exact statement was written in the article, and I am sure that all of us would not say that is like taking it from the King James version, but it says here that it is not an exaggeration to say that free enterprise in the textile industry rides on this case and I know better than to continue that argument because my colleague is going to be able to defend his position completely.

Senator ERVIN. The case was of overwhelming importance not only in the textile industry but in every industry.

Senator BAYH. Thank you.

In the industry matter, it is a little early to continue this thing to nail down what is ethical and what is not and the caseload which you have already alluded to is certainly something that has to be considered, the degree of holdings, but in this consideration, did the bar committee consider the canons of ethics 4, 13, 26, and 33?

Judge WALSH. We primarily considered canons 26 and 29.

Senator BAYH. Twenty-six and 29. Right. Now, then, in reaching your determination at least you feel that what is contained in the legal canons of ethics in a proper subject to be considered by this committee and in determining the judge's ability to conform?

Judge WALSH. Yes, we do.

Senator BAYH. Well, I hope we can clear up this business of ethics, and the reason I am asking this question is that we have had some varying degrees of inconsistency. This is always the case and I do not suggest that your testimony is inconsistent but that you just now say that you feel it important to consider the canons of ethics in dealing with this problem—whether a judge did indeed maintain a certain standard of ethics. You also said that you agreed completely with Professor Frank's testimony and in the cross-examination of him yesterday he did not consider the canons of ethics as having any place in Federal law at all, that this was strictly State law and that we were about to appoint a Federal judge on the appellate court now to the Supreme Court. Can you explain how you can agree with Mr. Frank's determination if you believe that the canons of ethics should be considered?

Judge WALSH. I think Mr. Frank's point was that in the Federal system we have a statute which, of course, supersedes any canon of ethics, but it would seem to us in the first place, the statute is not inconsistent with the canons and that whether we should or whether we should not, we looked at both. We figured he did not violate either one.

Senator BAYH. Well, in pursuing that point a bit further, in addition to statute, I suppose we lawyers would have to suggest in the final tests the degree to which the Supreme Court considers the statute, rulings, regulations, or the canons of ethics in its decision on any given case, would we not?

Judge WALSH. I would suppose so. They usually have the last word.

Senator BAYH. You say that a bit reluctantly.

Judge WALSH. No. Well, after you have been reversed once, you feel like that.

Senator BAYH. I would consider it a privilege even to have argued before the Supreme Court, so I thought I had that privilege.

Judget WALSH. No. I say it without any reluctance.

Senator BAYH. Now, in looking at this, would you agree with Mr. Frank that any sitting judge who held stock in a corporation that came before him who did not disqualify himself would be in breach of code of ethics?

Judge WALSH. I agree with Mr. Frank that that is the majority view and I also recognize the fact that in the fourth circuit they have a minority view, that if the holding is small in proportion to the total stocks outstanding they do not disqualify themselves.

Senator BAYH. Total stock outstanding—in other words, if you had an $18,000 interest in one corporation it might have a different impact than if it were in another corporation, or let us use another figure, $5,000 or $50,000?

Judge WALSH. I think that it goes to the interest in the outcome of the case. If you are going to decide a case in favor of General Motors and you have 1,000 shares, I do not know how many thousands are outstanding, but the fractional value of the decision to your stockholding is going to be minimal and when you realize that—I mean, after all, if a man is going to be a Federal judge, he has got to be able to lift himself above an interest in a $25 matter one way or another, and so for that reason, they do not have—there is an argument that you do not disqualify a person over minimal interest.

Now, I know, for example, Judge Hand, I think everybody who has ever practiced in New York knows that he had 25 shares of Westinghouse stock and he would start off by telling the attorneys that he had that investment. He would always sit because no one would want to give Judge Hand's participation in a case because he had 25 shares of Westinghouse stock. But there is a problem there and you are touching on it and I do not mean to minimize it in any way because the American Bar Association is now engaged in a recodification of the canons of judicial ethics. It is a difficult rule to phrase and a distinguished committee has been appointed. The chairman is Chief Judge Traynor of California, one of the outstanding judges in the country, and they are now addressing themselves to the question of judicial ethics. But I do understand that the fourth circuit has a view that is different from the majority.

Senator BAYH. We are going to bring Professor Frank into this, so I would like to remind you once again that he suggested not only that the opinion contrary to his was in a very small minority, and he did not agree with the minority as far as stockholdings—if you are talking about four shares in Westinghouse, or 25 shares of Westinghouse, it seems to me that this might be an insignificant interest, but if you get up into a number of shares, then we have a different question.

Judge WALSH. Right. I understand the point.

Senator BAYH. There is no need of beating that to death, either.

I trust that in this whole problem you did in fact look at the latest Supreme Court decision on ethics?

Judge WALSH. Well, if you are talking about the one that dealt with arbitrators, we did not think that was very relevant, because again as I say arbitrators are not men who hold permanent office. They are people you pick from a panel. Is that not what happened in that case? For that reason we do not think the problem of a Federal judge sitting en banc, where the case is of sufficient importance that all of the judges of the circuit must sit together, is to be compared with a case where you have a panel of arbitrators and you pick one and you can exclude one—it is like picking a jury, in a sense. You can exclude them until you find one who has no interest or no previous contact with a litigant.

Senator BAYH. I would suggest that it might be wise, and I will not burden you with this in any detail, but you might want to read that again.

Judge WALSH. Yes, sir.

Senator BAYH. Because in the court's language, it is very difficult to find any case that is exactly on point with another case, as you well know.

Judge WALSH. Right.

Senator BAYH. In that the court used rather specific language in which it said: "We have no doubt that if a litigant can show that the foreman of a jury or a judge in a court of justice had, unknown to the litigant, any relationship, the judge would have been subject to challenge." It also went on and I would like to point out that in the discussion, with Mr. Frank, as I recall, a couple of things that he had based his determination on—he did not agree with my opinion on the impact of the common law code, but his reason was that he said the case was dependent upon the American Arbitration Association rule

No. 18, and in reciting the case to him I quoted: "While not controlling in this case, rule 18," so it was not controlling. But the court went back again and looked at these canons of ethics that we have been discussing and they looked specifically at the social relations of a judge. I will just finish this line of discussion with the next to the last paragraph:

This Rule of Arbitration 18 and this Canon of Judicial Ethics 33 rests on the premise that any tribunal permitted by law to try cases in controversies must not only be unbiased but must avoid even the appearance of bias.

And this relationship of this arbitrator to this litigant was only 1 percent. It was a fleeting relationship. There had been no relationship at all for more than a year, so it seems to me that the relationship was much less than the one we are talking about here.

Judge WALSH. I do not in any way want to suggest a deviation from what the Supreme Court said there but I do not think you can compare arbitrators with Federal judges and I do not think the court meant to. The court was speaking of Federal judges in that earlier language as an a fortiori case. In other words, if a Federal judge must be free from a certain relationship, certainly an arbitrator has to, but I do not think the reverse argument helps you any or helps the point of view which you are projecting.

Senator BAYH. I am not speculating. It is here. And if you are going to talk about a fortiori, it just seems to me nobody really knows. It is a matter of sort of weighing the equities in the case. It seems to me you can make an excellent point, if you read at least Justice White's concurring opinion, and in one case the main opinion, that a justice sitting on a tribunal has a higher standard than an arbitrator. In this case, the *Commonwealth Tooling* case, all three arbitrators had agreed. It was not a split of a 3 to 2 as the one in Darlington and yet, despite unanimous agreement on the part of the arbitrators, they threw the case out.

Judge WALSH. I do not think there is any disagreement between us on this question of the standards of a Federal judge. It is as high as any and higher than most. All I say is that it is easier to disqualify arbitrators than Federal judges and you can have more leeway in selecting arbitrators than you can Federal judges.

Senator BAYH. Now, let me ask you to consider, if I may, something that I think you mentioned in your statement or came out in the discussion here. We talked about disqualification. Now, should this committee, in reaching a decision as to whether a judge should in fact disqualify himself, look at canon 26 and some of the other canons which talk about not even the slightest inference, or as I quoted here from the latest Supreme Court decision, must try not only to be unbiased but must avoid even the appearance of bias? What are we looking for?

Judge WALSH. I would say look for both.

Senator BAYH. How about the canon on personal investments which suggests that a judge should liquidate any holdings that might be coming before him, that it is reasonable to assume?

Judge WALSH. Right.

Senator BAYH. What about those 550 shares of the Stevens Corporation, which has been in court since the beginning of time and is one of the major litigants in the textile industry? Is this not sort of asking for trouble to hold onto this kind of stock?

Judge WALSH. Judge Haynsworth explained that under no possibility could a Stevens case come before him because he would be disqualified because of having represented it for so long. So, therefore, it would not make any difference how much or how little stock he had in Stevens. He could not sit on a Stevens case. So, therefore, the stock holdings had no importance whatsoever.

Senator BAYH. One other question here, on another line that we have developed, that I want to get your opinion on—is there a relevance in the whole field, under the ethical umbrella, of a judge securing bank loans for a firm with which he is associated? This has only come up recently. We did not realize the Judge's connection with Vend-A-Matic as far as what he did. He suggested he was in charge of some of the financial dealings.

Judge WALSH. I think this is something that is difficult to generalize. For example, if you have a family corporation, and again I am sure this is a matter which is going to be dealt with by Judge Traynor's committee of the American Bar Association, but——

Senator BAYH. We cannot wait on that, though. This is why I am asking you.

Judge WALSH. I say I am recognizing with you the difficulty in sweeping generalizations in this field. If you have a family corporation, I am sure that a number of judges in those circumstances have continued and have undoubtedly—if there were loans that had to be made, they discussed them. In this case as I understand it, Judge Haynsworth's relationship with Carolina Vend-A-Matic and the bank started long before he was a judge and he is not sure that he continued it after becoming a judge, but if he did, it would be a mere continuation in a relationship already established. It would not be as though he had gone out to act as a financial agent for the corporation.

Senator BAYH. You have been very kind. I do not want to put words in your mouth, but you have done very well on your own initiative. But since Senator Kennedy pursued what we should consider here, I think that our discussion has led us to believe that whether it is 26 or 33 or 27 or 13 in the canons, they are important and that we are talking not merely to try to reach a judgment on this very difficult case. We are talking about not whether a judge did in fact commit a wrong, frankly, it has not been brought to my attention as of this particular moment, and I hope it is not, that Justice Haynsworth has done anything wrong, but we are talking about vestments of appearance, appearance of bias, social and professional relationships which would lead to such appearance.

Judge WALSH. Right.

Senator BAYH. Thank you, gentlemen. You have been very patient. I hope that I have not been too picayune in pursuing some of these questions.

Senator ERVIN. Senator Burdick?

Senator BURDICK. I regret I had other business this morning but I will read the witness' testimony very carefully.

Senator ERVIN. Senator Cook?

Senator COOK. Judge Walsh, there is a question in my mind in relation to some of the questions in the line of questioning of Senator Kennedy. Let us discuss for just a minute this business of running against the stream of our times.

Let us assume for the point of this discussion that there are three basic ideologies in this country. Let us for the sake of clarity call them liberals, moderates and conservatives.

Now, do you feel that with these three philosophies in a nation as large as this and on this theory of running with the stream of our times, do you not think that the three basic ideologies, liberals, moderate and conservative, are absolutely entitled to representation or do you think that the ideology of our times should dictate the selection of judges to the Supreme Court to the exclusion of all other ideologies?

Judge WALSH. It seems to me this is exclusively a question for the President and with this committee's surveillance to be sure that the man selected is qualified.

Senator COOK. I might say to you that some of the decisions of Judge Haynsworth would not agree with my philosophy at all, but when I hear the tenor of this discussion and the fact that we should discuss that issue and we should discuss exactly what we want as individuals on this court, it brings back to me the court packing days of President Roosevelt. When he could not get from the court what he wanted, he proposed that the court be enlarged so he could get the decision that he wanted. Really, I suppose the Supreme Court should represent all segments of American political thought. I am wondering if you just might comment on this as a theory.

Judge WALSH. Well, I think there would be almost universal agreement that the decisions of the Supreme Court should in no way be coerced and that once that court is picked, it is to be free to protect all of us if that is, as I understand it, the thrust of your remarks.

I think there is universal agreement on it.

Senator COOK. Now, let us get back to the discussion of the *Darlington* case. Everthying from the Attorney General's files was made available to your committee, I am sure. Did it impress you and did it impress all three of you as lawyers that this situation as it transpired represented a complete and absolute vindication, because the record of the case itself shows that there was no motion for a new trial at the fourth district level on these grounds and that there was no discussion of it at all in the writ of certiorari to the Supreme Court on this case nor was there any discussion other than the facts involved in the case itself.

Judge WALSH. It is my understanding, Senator, that the union at no time in that litigation raised the claim of conflict other than in the letter to Judge Sobeloff. There was no claim of conflict raised in the review by the Supreme Court. There was no claim of conflict raised when the case came back before the fourth circuit for final disposition. And Judge Haynsworth sat on that final hearing without any challenge to him.

Senator COOK. And the same lawyers that were involved in the request to the senior judge at the time made no suggestion of it when the case came back for review in 1967?

Judge WALSH. That is correct.

Senator BAYH. Will the Senator yield just a moment? You have been very patient with me and I do not——

Senator COOK. Absolutely.

Senator BAYH. We have just been discussing our standard as a committee, and I have not decided in my own mind what that standard is but I would like to see it set and applied to all future nominees. I would like to expand your question just a bit to make sure we get the benefit of the committee of the bar and Judge Walsh and the others.

Are we indeed in our judgment limited to what was argued on appeal as to this business of appearance? If it is not argued, does it mean if it existed that would give the wrong appearance?

Judge WALSH. It seems to me that we are not so limited. I think this is a fact, though, to take into account as to how seriously the parties felt about it at the time.

Senator BAYH. My next question was going to be as one lawyer to three lawyers. If this was a matter either for a motion for a new trial, that you as lawyers thought could have been sustained for the benefit of your client or that you felt was of a serious enough nature on a writ of certiorari to the Supreme Court of the United States, could you not have been in dereliction of your duty to your client if you had not raised it if you thought it was absolutely material?

Judge WALSH. I just know that if I thought a judge had a conflict of interest which he concealed and he voted against me, in all probability I would raise that on appeal.

Senator ERVIN. Judge, do you agree with me it is going to be fairly difficult to formulate a code of ethics for judges which will result in wrapping judges up in some kind of ethical cellophane and lodging them in a monastery?

Judge WALSH. I do, Senator. I think it is going to be a difficult job even without trying to go that far. But I think that the—that is why whatever scrutiny is applied to the selection of a judge is so important, because really that is the only test. The only security we have is in the integrity of the judge and that is his internal integrity and if that is lacking, you cannot do much about it by rules, and so that is going to be the real test at all times. But I do think the canons for judicial ethics can be improved and I know that you could not have a better man than Judge Traynor to take on the job.

Senator ERVIN. There is a theory which seems to be evolving at this hearing that if a judge owned stock in a company that that disqualifies him to sit in a case involving anybody who does business with that company. If you apply that throughout the length and breadth of the land, no judge who owns any stock in General Motors could sit in any case because General Motors does business with millions of stockholders. It does business with everybody that buys an automobile that it manufactures.

So I do not see what a judge could do on some of these theories. He could not put his money in the bank because then he would be disqualified from trying a case with anybody that does business with a bank and that involves most all American people. He could not take it out and invest it in Government bonds because most of the cases that come before judges in a Federal court involve the United States which issues those bonds. All I can see to do to avoid his disqualification is to put it in a sock and then he cannot try a case involving any manufacturers of socks. Maybe instead of doing that, perhaps he

can put it under his mattress but then he could not try any case involving anybody who had anything to do with manufacturing mattresses.

Speaking now seriously I was very much intrigued by Senator Kennedy's questioning whether Judge Haynsworth would drift with the tide of current judicial decisions regardless of whether they harmonize with the Constitution or not.

Now, I would like to have your appraisal of a justice of the Supreme Court who I regard highly, Justice Oliver Wendell Holmes, Jr. He was a great dissenter and he did not drift with the tide. He was swimming against the tide. I was just reading some of his opinions in the *Truax* case the other night. He not only went against the tide then but if he stuck to his constitutional philosophy, he would go against the tide now, I think, because he pointed out that the Court was taking the 14th amendment, particularly the due process clause and equal protection of the laws clause, and using it in that day to impose their notions about laissez faire upon businesses of America and he said that they were going too far.

Now, the Court has turned the thing around and I think judges are using the equal protection clause and due process clause now to impose their will on the American people in another way. In other words, I disagree with many opinions but I think that you need some judges that do not always drift with the tide.

Judge WALSH. I understand your view, Senator, and again I do not suggest Judge Haynsworth is a drifter, either. I am just trying to make it clear he is a deliberate person who moves as he sees——

Senator ERVIN. I think the views of a judge should be as John Marshall said to accept the Constitution as a rule for his official conduct, and that anything that is within the scope of the Constitution he should give a liberal interpretation to effect that purpose, but anything that is without the scope of the Constitution he should be against.

Now, to confine this to specific cases is a very difficult task, of course. I am always intrigued by this question of the Constitution as a living document. I think it is a living document but that term is so often used by men to justify their theory that the Supreme Court should disregard the Constitution and go and substitute their personal notions for constitutional principles. If that is what the Constitution is, then the Constitution is not a living document, it is a dead document and the judges as executors can dispose of its remains any way they see fit. So, I think that is a very misleading term.

Now, just one other thing. I am sorry I gave you the impression I believe that you had the right to ask judges about how they are going to decide cases. Perhaps you may have been present when I examined Justice Potter Stewart.

Judge WALSH. That is right, sir. I was.

Senator ERVIN. In his case, I never asked him about but one case he had written an opinion on when he was on the circuit court. I asked him if that case was based upon a certain theory and he stated it was.

I asked him a number of general questions as to whether or not he accepted the theory that the Constitution should be interpreted in order to give effect to the intent of the Founders as expressed in that

instrument and I also asked him about what Judge Thomas Cooley said in his book on "Constitutional Limitations" where he said a court or legislature which would give to a written Constitution a meaning contrary to the intention of its drafters would be guilty of reckless disregard, disobedience of official law, and disregards of public duty.

Now, I have taken the position all the time that no nominee for a judgeship should be asked how he is going to decide some case in the future or any questions that would lead to that. When I examined Justice Thurgood Marshall, and when I examined Justice Fortas, I stated expressly in the record that I did not think any nominee for a judicial post should be asked how he would decide some case in the future. I also stated that he did not have to answer anything about any judicial decisions but I was going to read the opinions which he has written and which he has concurred in into the record for consideration of the Senate. And that then if he wanted to voluntarily make any comments on those decisions he could do so. I told Judge Marshall and Fortas that I was going to give my construction of whether those decisions fitted into the Constitution or not and he could comment or refrain from commenting on my comments as he saw fit.

Judge WALSH. I remember the interrogation.

Senator BAYH. May I ask one other question?

The gentlemen have already been very patient. I am extremely sensitive about this whole business of ethics because it is not only extremely important but it is extremely embarrassing to a person to have his ethics or conduct questioned, even if we are not admitting any breach, but Senator's Cook's question stimulated me to ask, as a neophyte lawyer, the three gentlemen who have gone to the ultimate in litigation, would you have sought appeal if you were dealing in a case where the judge involved, as this was the case, where you knew that he had ownership of almost a half million dollars with a company that was doing business with one of the litigants and that that half million dollars was half of his estate at the time?

Judge WALSH. Under the circumstances of this case, I would not.

Senator BAYH. Then, a while ago you discussed the degree of ownership. It is rather difficult for me to see why if a judge had half his estate tied up in a company that was doing business with one of the litigants, at least you would not have used this, as an attorney, for trying to find grounds for appeal, would not even consider it?

Judge WALSH. In this case, I would not have appealed on a claim of conflict.

Senator BAYH. The fact that he had his name signed to release $100,000 of loans, perhaps more than that, and the estate financing in the company at the time, you would not have used that, either?

Judge WALSH. I do not ——

Senator COOK. Will the Senator yield? I think that you ought to get it in its true perspective. Regardless of whether it was $450,000 or a $1,450,000, I think we have got to put it in the true perspective. The decision in this case did not involve the company that he had $450,000 or any other sum of money in. It was a case that was decided on a company that did less than 3 percent or 3 percent of its business with a company he was affiliated with and I contend this even takes it outside rule 26 of the canons. He was not sitting on a decision that dealt

directly with the company he had vested interest in whatsoever in any way, shape, or form and I think when you answer this question this has got to be given absolute and serious consideration because had he had that same interest in Milliken Deering, obviously, the matter would have been altogether different. He did not. He did not even have nor did his company even have all or a substantial part of the business of Carolina Vend-A-Matic with the company involved in the suit.

So, I think this is where we make the difference and this is where we apply the canons.

Senator BAYH. Here again, I am talking about propriety.

Senator COOK. We are discussing the propriety.

Senator BAYH. The shadow of a doubt.

Senator COOK. And we are also discussing that this propriety was brought to light by an anonymous telephone call. We sit here today without any knowledge whether any of the other judges that sat on that court and rendered that decision had any interest in any other textile mills, had any interest in any corporation that sold a piece of machinery or a sheet of paper to the company involved. We are judging it all on one anonymous telephone call and we cannot say to any degree of certainty whether any other judge that rendered that decision or entered into that opinion had a thing in the world to do with the textile industry or any allied industries who dealt with the Milliken——

Senator BAYH. Here is one Senator who is not judging it on the basis of one anonymous phone call because although there has been a dispute, I do not think the contents of the anonymous phone call had anything at all to do with this. That was an allegation of primary, criminal offense, and I have not even entertained such thoughts as far as our nominee is concerned.

I am talking about this business of information that has come to light that was not available—we will perhaps get this in better context when we ask the litigants on one side. At least, I understand they will testify here. It is my understanding they did not know at that time of the $450,000 interest in this company. They did not know of the discrepancy. They did not know of the trusteeship and pension and retirement fund, did not know of the wife of the nominee being a secretary. None of these things lend anything specific but it is just very questionable.

Senator ERVIN. I would just like to call attention to one thing. In his private file——

Senator BAYH. Will the Senator yield to let me explain my leaving? I do not want to be discourteous but we have on the Senate floor the disaster relief bill that is extremely important. We have been working on it for 4 years, and I am the Senate leader on this, and it is going to be up in about 5 minutes.

Senator ERVIN. I would like to invite attention to this letter from Patricia Eames, Assistant General Counsel, Textile Workers Union of America, dated February 6, 1964. After all of these matters have been brought out by investigation conducted by Judge Sobeloff and after statements referred to had been made available to her, she said:

DEAR JUDGE SOBELOFF: Having read and reread Mr. Updike's letter to you of January 17, I believe that the facts therein set forth establish that Deering Milliken did not throw its vending machine contracts to Carolina Vend-A-Matic

as was alleged to our Union on November 20. With that basic fact established, it becomes clear that my collateral concerns, as expressed to you in the last paragraph on the second page of my letter to you of December 17, become inappropriate.

I regret that Mr. Updike feels that my letter to you was irresponsible. At the time when the telephoned message to our Union had been passed on to me, and I had noted the officerships in Carolina Vend-A-Matic and had heard what reports were available to me regarding Deering Milliken's southern plants, frankly I was sorely troubled as to what I should do about a half-knowledge which it would clearly be irresponsible to keep silent about. It appeared to me that the most responsible course was to write to the Chief Judge.

My letter to you has caused trouble. I am genuinely sorry for that. Since we now know that the allegation made to our Union was inaccurate, we know that that trouble was unnecessary. Thus I am the more regretful of the trouble caused.

Sincerely yours, Patricia Eames, Assistant General Counsel.

If the union had thought there was anything to this they would have raised the point because the case was still subject to motion, as I understand it, to set aside the judgment and certainly was subject to appeal. There were no questions raised. So despite the efforts of the Senators to compare this to improperly sitting, evidently the union at that time thought differently.

Do you have anything further?

Judge WALSH. No, sir.

Senator BURDICK. Since I missed your direct testimony I just want to ask—the American Bar Committee considers the qualifications of the nominee?

Judge WALSH. Yes.

Senator BURDICK. How did you happen to go into the ethical area?

Judge WALSH. Well, the allegation had been publicized and we did not feel we could report upon the professional qualifications without going into it. Ordinarily, we do not go beyond the point of professional qualifications.

Senator BURDICK. And you found him satisfactory in both areas?

Judge WALSH. Yes, sir. We found no impropriety in failing to disqualify himself.

The CHAIRMAN. The Committee stands in recess until 2:30 p.m.

(Whereupon, at 12:30 o'clock p.m., the committee was recessed, to reconvene at 2:30 p.m., this day.)

AFTERNOON SESSION

Senator ERVIN (presiding). Senator Eastland has asked me to open the meeting so we can proceed.

The committee will come to order.

We will hear the next witness, Mr. Meany.

STATEMENT OF GEORGE MEANY, PRESIDENT, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, ACCOMPANIED BY ANDREW J. BIEMILLER, LEGISLATIVE DIRECTOR, AND THOMAS E. HARRIS, ASSOCIATE GENERAL COUNSEL

Senator ERVIN. Mr. Meany, I suggest that you identify yourself, for the purposes of the record, and the two gentleman who accompany you.

Mr. MEANY. Yes. I am president of the American Federation of Labor and the Congress of Industrial Organizations, and I am accompanied by the legislative representative, Mr. Biemiller, and the counsel of the AFL–CIO, Mr. Thomas Harris.

I appear here today to register the objections of the AFL–CIO to the nomination of Judge Haynsworth to the Supreme Court and to urge this committee and the Senate to refuse to consent to his appointment.

No responsible organization lightly opposes the nomination of any man to the Supreme Court. In that connection, I would like to point out this is the second time in 40 years, or the first time in 40 years, that the American trade union movement has actively opposed the nomination of a Supreme Court nominee.

Such opposition, in our opinion, should only rest upon solid, substantiated grounds. In the final analysis, we believe the crucial test is whether the nominee is fit to sit on the Nation's highest court.

By that yardstick, we say Judge Haynsworth should not be confirmed. He is not fit to be an Associate Justice of the Supreme Court.

Our opposition is based on three grounds:

His decisions prove him to be antilabor.

He has demonstrated indifference to the legitimate aspirations of Negroes.

He has demonstrated a lack of ethical standards, while on the bench, that disqualify him from consideration for promotion.

I propose to take each charge separately.

Counsel for the AFL–CIO has prepared, and we offer as an appendix to this statement, an appraisal of Judge Haynsworth's record in labor cases.

Stated briefly, this record is one of insensitivity to the needs and aspirations of workers and to the plight of unorganized employees working for an antiunion employer in a local environment hostile to unions. In marked contrast, he is instinctively sympathetic with the problems of employers, including rabidly antiunion ones.

In making this study, our counsel examined each labor case in which Judge Haynsworth participated which went to the Supreme Court, in order to compare Judge Haynsworth's views on labor issues with those of the Supreme Court.

During his 12 years on the bench, Judge Haynsworth sat on seven cases involving labor-management relations that have been reviewed by the Supreme Court.

In all seven cases, Judge Haynsworth took the antilabor position.

In all seven cases, Judge Haynsworth was reversed by the Supreme Court.

In six of these cases, the Haynsworth position was unanimously rejected by all participating Supreme Court justices. In one case, one Supreme Court justice, Justice Whittaker, supported the Haynsworth position.

Thus, Judge Haynsworth's views in labor cases were rejected not only by liberal Supreme Court justices but by conservative or moderate justices as well.

There are three additional decisions which could be regarded as labor cases in a broad sense, though not involving labor-management rela-

tions. In each of these cases, too, Judge Haynsworth voted in favor of the employer, and in each of them the Supreme Court reversed.

Thus, Judge Haynsworth's overall record in the Supreme Court in the labor field is 0–10.

My counsel is here with me and will answer any legal questions you may have on this record.

In addition he is prepared to answer questions on the most important case I will bring to your attention, which case he has had personal contact with and knowledge of.

On the matter of civil rights cases, the Leadership Conference on Civil Rights, of which the AFL–CIO is a member, has prepared a similar appraisal of Judge Haynsworth's record in this area. We will associate ourselves with their appraisal.

But the most important of our charges is that Judge Haynsworth has displayed a disregard for those ethical standards we believe essential for a justice of the highest court in the land.

Judge Haynsworth had a major conflict of interest in a case—the *Darlington* case—involving an affiliate of the AFL–CIO. He did not disclose his financial interest to the union litigant or, apparently, to his colleagues on the court. He cast the deciding vote on behalf of the employer and against the union.

The facts are these:

In 1956 Darlington Manufacture Co. owned and operated a textile mill in Darlington, S.C. It was one of about 30 units controlled by Deering Milliken & Co. The Textile Workers Union of America won a National Labor Relations Board election and Deering Milliken closed the plant, throwing 500 workers out of jobs. Lengthy and involved NLRB and court proceedings ensued, and, indeed, are still going on. Darlington, Deering Milliken, the Textile Workers Union and, of course, the NLRB were parties in this litigation.

A preliminary phase of the matter was before the court of appeals in 1961, with Judge Haynsworth writing the opinion.

The case was argued for the first time on the merits before the court of appeals on June 13, 1963, and was decided on November 15, 1963. The court of appeals held, 3–2, that an employer has the absolute right to close out "a part or all" of its business, regardless of anti-union motives. Judge Haynsworth joined in the majority opinion.

Judge Haynsworth had had a long business relationship with the textile industry in general and with Deering Milliken in particular, and he still had such a relationship in 1963.

The Martindale Hubbell Law Directory for 1956 lists the law firm in which Judge Haynesworth was then the senior partner as counsel for numerous textile mills and companies, including "Judson Mill." Judson Mill was a Deering Milliken mill. This former representation of Deering Milliken was standing alone, reason enough for Judge Haynsworth to disqualify himself in the Darlington case.

But that was not the end of Judge Haynsworth's connection with Deering Milliken.

In 1950 Judge Haynsworth and six associates established a vending machine company, Carolina Vend-A-Matic Co., Inc. Judge Haynsworth and three of his law partners made up four of the original seven directors, and one of his partners was president and another

secretary. Sometime between 1950 and 1963 Judge Haynsworth became first vice president of this vending company.

The original capitaliaztion was $30,000. We do not know what Judge Haynsworth's ownership was originally, but in 1964 it was about one-seventh, or 15 percent.

In 1957 Wade Dennis was brought in as general manager. He came from Judson Mill, a Deering Milliken operation.

Carolina Vend-A-Matic had vending installations in Deering Milliken plants from 1958 on, which had average weekly gross sales of $974. In August, 1963, some 2 months after the second Darlington argument but before the decision was announced, Carolina Vend-A-Matic secured the vending business in another Deering Milliken plant, assertedly on the basis of competitive bidding. This vending installation produced an average weekly gross of $1,000.

In May 1963, Carolina Vend-A-Matic set up a North Carolina subsidiary. It was incorporated by the law firm that argued the case for Darlington a month later.

In 1964, Carolina Vend-A-Matic was sold to Automatic Retailers of America, Inc., now ARA Services, Inc. Judge Haynsworth swapped his shares in the original firm for 14,173 shares of ARA, which closed that day at a price of $32.25 per share.

The judge immediately sold his stock, he has confirmed to newsmen, saying he received less than the $450,000 market value.

According to newspapers, "the judge said he could not recall how much he got for the shares."

Initially, Judge Haynsworth declined to answer reporters' questions as to whether he had owned shares in Carolina Vend-A-Matic at the time of the Darlington decision. When an enterprising reporter later examined and published the records of the Securities and Exchange Commission, the judge acknowledged the facts that I have just stated.

He then told the Associated Press he considered his actions were "entirely proper."

Judge Haynsworth assured his colleagues that he "had no active participation in the affairs of Carolina Vend-A-Matic."

In June 1963, he was first vice president, and I submit to you that a U.S. Court of Appeals judge does not become first vice president of a vending machine company just for the honor of the thing.

He had a large interest—$450,000 worth—and unless he was very rich indeed, he must have kept up with how his vending company was doing.

Finally, his coowners and coofficers included his old law partners, and it is inconceivable that they did not keep him apprised as to its affairs, whether at directors' meetings or otherwise.

We submit that Judge Haynsworth lacks the ethical sensitivity a Supreme Court Justice should have.

He sat on a case involving an old client. He had a large interest in a concern which was doing business with that client, and was soliciting more business.

He did not tell the union of these interests, and he did not disqualify himself.

I think it proper to point out, Mr. Chairman, what happened when

the Darlington case reached the Supreme Court, where the combined company position was argued by Senator Ervin.

Mr. Justice Goldberg was then an Associate Justice. He had been, as the members of this committee know, the special counsel to the AFL–CIO before becoming Secretary of Labor. He had also, while in private practice, represented the Textile Workers Union of America, though not in the instant case.

Justice Goldberg disqualified himself and did not sit on the case.

His concept of ethics stands in sharp contrast to those of Judge Haynsworth, whose firm had been counsel for a Deering Milliken mill and who had nearly half a million dollar interest in a company doing $100,000 a year in business with Deering Milliken, but who failed to disclose his past representation or his present interest, and cast a vote against the union.

Judge Haynsworth and the President's press secretary, Mr. Ronald Ziegler, have attempted to dismiss these charges as having been investigated, with the judge cleared, by the Justice Department, by then Chief Judge Sobeloff, and by the late Attorney General Robert F. Kennedy.

That is not the case.

The Justice Department and Judge Sobeloff had before them charges of bribery. These charges were not proven and were not true.

They did not investigate and did not consider the charges we make—that the judge had a hidden conflict of interest. Indeed, there is no evidence that they ever knew how much of a financial involvement Judge Haynsworth had in Carolina Vend-A-Matic.

Mr. Kennedy's only involvement was to acknowledge receipt of Judge Sobeloff's letter and associated himself with the findings. He never considered or even heard of the conflict of interest charge.

Since the President's press secretary chose to release selected and misleading excerpts of the correspondence in the case, the Textile Workers Union of America released the entire transcript. The AFL–CIO has sent copies of this statement to every Senator.

This, then, is the record of antiunion and anticivil rights bias, and of improper ethics on the part of Judge Haynsworth. We believe the record proves him unfit to sit on the Supreme Court.

We, therefore, ask this committee to refuse to consent to the appointment of Judge Clement F. Haynsworth, Jr., to be Associate Justice of the Supreme Court of the United States.

Senator McClellan. Mr. Meany, I did not have an opportunity to read your statement, but I heard you read it. I may have some questions a little later, but in the meantime, have you stated now in this opening statement every reason that you can think of why you think this nominee should not be confirmed?

Mr. Meany. Yes, and we have submitted, as I said, a legal paper backing up this.

Senator McClellan. I received my copy a few minutes ago. Is it your contention that because he represented a number of textile companies, that this would render him unfit to serve on the Supreme Court?

Mr. Meany. I do not take the position that the fact that a lawyer represents anybody makes him unfit to sit on the Supreme Court. I draw a line what a man does as a lawyer and what he does as a judge.

I think his actions as a judge in the textile case where he was formerly counsel in failing to disqualify himself renders him unfit to sit on the Supreme Court.

Senator McCLELLAN. The fact that he may have represented corporations, or represented textile companies—

Mr. MEANY. No. I do not take that position at all.

Senator McCLELLAN. I do not think that position is tenable because I supported the confirmation of Mr. Goldberg—I had not taken the position——

Mr. MEANY. No. I do not take that position, Senator.

Senator McCLELLAN. That he should be disqualified because he was a labor lawyer.

Mr. MEANY. No, no.

Senator McCLELLAN. And another thing, I take it from a first impression of your statement, there are just two things: First, you think that he should have disqualified himself in the particular case to which you referred, the *Darlington* case. Is that correct?

Mr. MEANY. Yes, sir.

Senator McCLELLAN. And second, that you oppose his philosophy, that you deem from the decisions that he participated in that labor was involved, that his philosophy in that particular field would cause you to oppose his confirmation, am I correct?

Mr. MEANY. Yes.

Senator McCLELLAN. Now, those are the two things. With respect to his philosophy, some of us have been criticized in the past because we took a position that we did not favor the philosophy—we were concerned about the philosophy of a nominee, and we were concerned about it. But I take it from your statement you are concerned and you think this subject is appropriate to be considered by this committee.

Mr. MEANY. Yes. When a man's philosophy is reflected in his decisions when he is sitting with a robe on. That is the difference.

Senator McCLELLAN. Well, I do not care whether he is sitting with a robe on or off. Before he puts it on I would like to know something about his philosophy because he is still going to have that philosophy when he gets his robe on. I always thought it was proper to ascertain, if you could, what the philosophy of a person is, especially when they are going to have responsibility as a judge, particularly on the Supreme Court, because I think——

Mr. MEANY. Senator——

Senator McCLELLAN (continuing). A man's philosophy has an impact on what he does or does not do.

Mr. MEANY. Philosophy has a great deal more of an impact when it is used by a man as a judge. You see, the fact the man is a lawyer and represents a certain type of client does not necessarily mean that he has a philosophy in that direction. It means he has a client, he is getting paid. But when a man is sitting as a judge, I think it is quite a different thing.

Senator McCLELLAN. That is right. I have taken the position before they became a judge, before they had a judicial record, that I would like to interrogate them to ascertain as much as I could about what their philosophy would likely be when they got on the bench because I think that the philosophy that one has, an individual's philosophy,

has a very definite influence and impact on the kind of decisions he may reach. Men of two different philosophies with the same facts before them might reach a different judgment. And after one has served on the bench, as has the judge whose nomination is before us, Judge Haynsworth, and as others we have had before us in the past, you can pretty well glean from their decisions, the decisions they have rendered, particularly where they have written opinions, and those they have participated in, pretty much what their philosophy is, and it is on the basis of that philosophy that we can pretty well pass judgment on this applicant together with taking into consideration the charge that there was a conflict of interest in the *Darlington* case. That is a matter that the record is pretty clear on, I think, up to this time and everybody can make his own decision on it.

I may have some more questions.

Let me ask you one more question. Are you willing to place in the record all of the cases in which labor was involved in which Judge Haynsworth participated and give your indication of whether you approve or disapprove of the opinion that he wrote in those cases?

Mr. MEANY. I would be willing to place in the record all of the cases and give my opinion as to what his general actions have been in labor cases.

Senator MCCLELLAN. Whether you approve or disapprove of the decision rendered and anything that——

Mr. MEANY. I think that there is a very simple answer to that, Senator, that I would not approve of a decision that was against labor and——

[Laughter.]

Senator MCCLELLAN. I think that is right. So now we are down to the facts about it. If he decided against labor, it was bound to be wrong. Labor never had a case that should not have been decided in its favor, is that your position?

Mr. MEANY. What is that?

Senator MCCLELLAN. I say, according to what you just said, we can just get right down to the basic facts and this is what is involved. If he decided a case against labor——

Mr. MEANY. No.

Senator MCCLELLAN (continuing). He is bound to be wrong.

Mr. MEANY. There is much more than this involved.

Senator MCCLELLAN. I am talking about what you just said.

Mr. MEANY. We look at the record and we look at the number of decisions and we decide from that what the philosophy of the man is in labor cases.

Senator MCCLELLAN. Good. That is correct.

Mr. MEANY. I would perhaps be willing to support someone who has at some time made decisions against labor. This question here is, there has been a consistent policy and consistent pattern of antilabor decisions which when they got to the Supreme Court found no support by liberals, moderates, or conservatives.

Senator MCCLELLAN. How many cases came before the Fourth Circuit Court of Appeals in which labor had an interest in which he decided favorable to labor? Can you tell us that?

Mr. MEANY. I think Mr. Harris can answer that question.

Senator McCLELLAN. How many do you say, Mr. Harris?

Mr. HARRIS. Well, that would involve you, of course, in examining every labor case that he had sat on——

Senator McCLELLAN. Yes.

Mr. HARRIS (continuing). Per curiam and otherwise.

Senator McCLELLAN. How?

Mr. HARRIS. Both per curiam and those in which there were opinions.

Senator McCLELLAN. Let us take the whole record. We are going to judge him by the record. If there had been a 100 cases, how many did he decide adverse to labor?

Mr. HARRIS. We have not looked at that.

Senator McCLELLAN. I see.

Mr. HARRIS. What we have done, Senator McClellan, is two things. This determination that you suggest would also involve you in deciding what is a labor case, for instance, where an issue——

Senator McCLELLAN. I will let you judge that.

Mr. HARRIS. Whether an issue on the seaworthiness of a vessel, Jones Act cases, personal injury cases are labor cases or not, also whether you include fair labor standards cases or not.

It seemed to us there were only two things you could do. One is read all the decisions and see whether you agree with them, which would involve a subjective judgment of mine which probably would not be very significant to you.

Now, the other thing you can do is look for some sort of objective measure, some kind of test. We conceived of two tests. One is the labor cases that Judge Haynsworth sat on that went to the Supreme Court. We looked at every one of those. Those are listed in this memo. And I am sorry you have not seen the memo but it was filed nearly 2 weeks ago, 2 weeks ago tomorrow, with the committee.

Senator McCLELLAN. It may have been. I do not think I got a copy.

Mr. HARRIS. At the insistence of the committee.

Now, looking at these cases, we find that every case on which Judge Haynsworth sat that was reviewed by the Supreme Court——

Senator McCLELLAN. How many is that, 10?

Mr. HARRIS. Well, there are seven straight labor-management cases. There are three others of this borderline sort that I described. And perhaps one or two additional ones that other unions have found that we did not.

Senator McCLELLAN. How many of those cases did he write the opinion in?

Mr. HARRIS. That would appear in the appendix.

Senator McCLELLAN. Only two, was it not?

Mr. HARRIS. He wrote the opinion—just a minute. I can give you the answer. I certainly find very few in which he wrote the opinion. I believe he wrote the opinion in first Darlington but that did not go to the Supreme Court until a later stage.

Senator McCLELLAN. I am talking now about the 10 that you are judging him on that went to the Supreme Court.

Mr. HARRIS. I would say that the only case that I find really, and I would want to check this again, but the only one I find really where you would say he wrote the opinion is the authorization card cases and I want to qualify——

Senator ERVIN. The case of the packing companies case.

Mr. HARRIS. I want to qualify that. What happened in these authorization card cases was that Judge Haynsworth wrote the opinion in the leading case in that circuit, which was Logan Packing. Then, when the same issue came before the courts later, the cases were disposed of per curiam by the court. Three of these cases were up last year and they were reversed by the Supreme Court. But I think you would have to say that the view of the circuit on that body of law was determined in Judge Haynsworth's opinion in Logan.

Senator MCCLELLAN. As I understand it, there were 10 cases that went to the Supreme Court and that he wrote the opinion in only two of them.

Mr. HARRIS. Well, I did not find but one.

Senator BAYH. Will the Senator yield for one short question?

Senator MCCLELLAN. If I get an answer, I will be glad to yield.

Senator BAYH. I wonder if that diminishes the effect of his vote just because he does not write the opinion.

Senator MCCLELLAN. Well, he may have written a hundred opinions that did not go to the Supreme Court because they were so good and sound nobody would challenge them. Very well.

Mr. HARRIS. The Senator is correct. Another case in which he wrote the opinion is United States against Seaboard Airline. That is one of these borderline cases that I did not really know whether to characterize as a labor case or not.

Senator MCCLELLAN. Well, then in one of the 10 that went to the court where he wrote the opinion, did not the Supreme Court say in its opinion: "Despite our reversal of the Fourth Circuit below, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter," indicating to me it was a borderline case.

Mr. HARRIS. Which case is that, sir?

Senator MCCLELLAN. The packing company case.

Mr. HARRIS. Well, of course, you could pick out particular portions of the——

Senator MCCLELLAN. That is what they said in that case, where he apparently wrote the opinion.

Mr. HARRIS. Well, on pages 12 and 13 of my memo you will see another quotation from the same case which would leave the impression that Judge Haynsworth below is departing from long settled Supreme Court doctrine and that——

Senator MCCLELLAN. Well, that is not unusual. The Supreme Court itself departs from long lines of its own decisions on the Constitution, interpretation of the Constitution, and reverses itself. That within itself is not criticism, surely.

Mr. HARRIS. However that may be, when Judge Haynsworth decided this opinion there had already been Supreme Court decisions on this issue which he did not follow.

Senator MCCLELLAN. Mr. Harris, you know we have Supreme Court decisions in which the Supreme Court reverses itself.

Mr. HARRIS. Oh, sure.

Senator MCCLELLAN. That is certainly not a fault.

Mr. HARRIS. But I do not understand the courts of appeal are empowered to reverse the Supreme Court.

Senator McCLELLAN. It has been said they were but they have got a right to make the decision.

Mr. HARRIS. That is what——

Senator McCLELLAN. If he decided contrary to a long line of positions, he may have been presenting the matter to the Supreme Court for another decision which he would have a right to do.

Mr. HARRIS. Well, the Supreme Court—Judge Walsh said this morning it had reversed him only once in the last 5 years. That gets you into this gray area. They reversed three of his cases at once in one opinion. You can count it as one or count it as three.

Senator McCLELLAN. Four reversed in 5 years, is that right? That is the total, if you count——

Mr. HARRIS. This is——

Senator McCLELLAN. Is that right?

Mr. HARRIS. This is the only one of his cases that has been up there.

Senator McCLELLAN. Well, if he is a pretty good judge, appeals are not often taken from him.

Mr. HARRIS. The only labor case, since he has been on the court, he has had 10 labor cases that went to the Supreme Court. The fact that he did not write the opinion, I think, does not indicate that it was not a significant case. It does not indicate that he did not play a role. I suppose he pays some attention to the case when he votes on it even if he does not write the opinion.

Senator McCLELLAN. I am sure he does.

Mr. HARRIS. He voted against the union, in every case he was reversed by the Supreme Court. In every case——

Senator McCLELLAN. He was not reversed alone. There were several other judges reversed, were there not?

Mr. HARRIS. He got the vote of one Supreme Court Justice, once, Justice Whittaker.

Senator McCLELLAN. Are you talking about these 10 cases?

Mr. HARRIS. These 10 cases which are all the labor cases he sat on which were reviewed by the Supreme Court.

Senator McCLELLAN. According to your judgment, he was not even entitled to that, was he?

Mr. HARRIS. No. [Laughter.]

Senator McCLELLAN. He just cannot do right. Very well.

Mr. HARRIS. But he never got the vote of a single judge, conservative or moderate. Judge Harlan, Judge Clark, Judge White. None of them ever cast a vote with him in a single labor case.

Senator McCLELLAN. Which clearly indicates to me he is neutral, he has a mind of his own.

Mr. HARRIS. I suggest it indicates two things, that he always holds against unions if it is possible to do so and that judged by the standards of the Supreme Court, he was not a very good judge in labor cases because he was reversed all of the time, time after time. And not on any five to four basis, either. Unanimously.

Senator McCLELLAN. Now, that is making a pretty strong accusation. Again, I will ask you to submit, if you will, in support of your testimony, a list of all of the cases that he has participated in that came before the Fourth Circuit Court of Appeals that were labor cases in which labor's rights or labor law were involved—then you take the

number of those that were favorable to labor and those that were unfavorable.

Now, let us take a record like that and see how that compares. I think that is a fair way to judge.

Mr. HARRIS. Well, we have done one other thing in an attempt to get some kind of objective measure. As I say, tested against the Supreme Court, he is antilabor and he is not in line with the Supreme Court.

Now, we did one other thing. We looked at every labor case in which the court below was divided and we have an appendix here which summarizes each of those cases where the court below was divided. You will see that he sat on 16 of these cases that we found.

Now, it appeared to us that he had voted in favor of the employer 12 times, in favor of labor three times, and took a middle position once. These are cases in which his own court was divided so that you could suppose that a judge might have gone either way, depending on his philosophy, the sort of thing you said at the outset with which I agree. On that basis——

Senator MCCLELLAN. Let me——

Mr. HARRIS. On that basis in these close cases he was against us 12 times, in favor three times and in the middle once.

Senator MCCLELLAN. Let me ask you now, are you willing to prepare the list that I have suggested? I want to get it in the record, and I want to give you the opportunity to prepare it first.

Mr. HARRIS. There is one other thing——

Senator MCCLELLAN. And give you the opportunity to submit it for the record.

Mr. HARRIS. There is one other thing that we do have. We endeavored——

Senator MCCLELLAN. Are you willing to prepare the list as I have suggested?

Mr. HARRIS. No.

Senator MCCLELLAN. Well, I am going to try to get it in the record from some source.

Mr. HARRIS. I would like an opportunity to tell you why I am not.

Senator MCCLELLAN. All right.

Mr. HARRIS. We got from the Library of Congress a list of every case on which Judge Haynsworth had sat, per curiam, everything. It is this thick. I do not think that run of the mine cases on which the court was unanimous below——

Senator MCCLELLAN. I am talking about labor cases.

Mr. HARRIS (continuing). Are of any significance.

Senator MCCLELLAN. I am talking about labor cases.

Mr. HARRIS. Well, I do not think that run of the mine labor cases on which the court below was unanimous, on whether the evidence was such to support the Board or was not sufficient, I do not think those cases are of any significance and I am not going to——

Senator MCCLELLAN. He could very well have dissented with them if he was prejudiced to labor.

Mr. HARRIS. I am not going to undertake 3 or 4 weeks research to produce a document which I think would be of no significance. If the committee thinks it is significant I suggest that they ask the Library of Congress to do it. It has already done a great deal of the work.

Senator McCLELLAN. Well, we probably could have somebody do it but I wanted to give you the opportunity to make that record if you could and show by it how prejudiced he is against labor and how unfair he has been in all of the cases that have come before him.

Mr. HARRIS. We have submitted an analysis of such of his cases as we think of significance. If somebody else thinks others are significant, I suggest that they submit the analysis.

Senator McCLELLAN. Well, I think we can get an analysis of some other cases. I want to give you the opportunity first because you are the one making the challenge. I yield to——

Senator ERVIN. Mr. Meany, you say this is the second time in history that the organizations which you represent have opposed the confirmation of a nominee for Supreme Court Justice?

Mr. MEANY. That is my opinion. As far as I can remember.

Senator ERVIN. And the other time, the same organizations opposed the nomination of Judge John J. Parker.

Mr. MEANY. That is right, 1930.

Senator ERVIN. And he was defeated by two votes in the Senate and then continued on the Fourth Circuit Court of Appeals and became one of the most distinguished jurists that North America ever has known, did he not?

Mr. MEANY. As far as I know, your statement is true. He had a change of heart. [Laughter.]

Senator ERVIN. Well, the reason you opposed him in that case was because he followed the decision of the Supreme Court of the United States on what was called the Yellow Dog Contract.

Mr. MEANY. Yes.

Senator ERVIN. That is all?

Mr. MEANY. Well, that was one of the cases.

Senator ERVIN. If he had not followed the decision of the Supreme Court, he would have been guilty of judicial insubordination, would he not?

Mr. MEANY. I am not a lawyer. I cannot say.

Senator ERVIN. Mr. Harris just explained you are are supposed to follow the decisions of the Supreme Court and I think we know that.

Mr. HARRIS. I agree with you that the attack on Judge Parker on that ground was unjustified. But the federation succeeded in blocking his confirmation to the Supreme Court and, as you say, he served for many years thereafter as a prolabor judge and if we can get both of the same two results here we will be happy. [Laughter.]

Senator ERVIN. Now, Mr. Harris, I want to get your definition of what is a prolabor judge. Is a prolabor judge a judge who decided all cases regardless of their merits in favor of labor?

Mr. HARRIS. There is not any judge like that, Senator Ervin.

Senator ERVIN. No.

Mr. HARRIS. And there should not be.

Senator ERVIN. And now as far as Judge Haynsworth is concerned, can you tell me any case except the *Gissel Packing Co.* case—as you know he wrote that—that was against labor from your viewpoint?

Mr. HARRIS. In this memorandum there is one other case listed where he wrote the opinion. I do not suggest that it is a significant case.

Senator ERVIN. What is that case?

Mr. HARRIS. United States against Seaboard Airline. This had to do with the application of the Safety Appliance Act and I think it is one of these borderline cases that might be regarded as labor or not. We just put it in because we did not want to be accused of picking and choosing.

Senator ERVIN. Now, you say you do not expect a judge to decide all cases in favor of labor. What percentage of cases in which a judge participates would show that he was fair?

Mr. HARRIS. Well, I think that the two tests we adopted—well, there are three things you could do. One, you could reach your own judgment reading all his opinions or looking at all the cases he sat on. The other thing you can do is compare him with the Supreme Court in the cases that went up. The third thing you can do is compare him with his colleagues. We did each of those last two in this memo.

Senator ERVIN. But you just picked out certain cases to compare.

Mr. HARRIS. No. We picked out every case that he sat on that went to the Supreme Court and we picked out every case where there was a division of opinion on the fourth circuit.

Senator ERVIN. Well, you did not pick out all of the cases by a long shot.

Mr. MEANY. Naturally, we did not pick out cases that were not——

Senator ERVIN. You are counting cases just like we count votes over here on the Senate floor. Now, in what percentage of cases should a judge be on the side of labor in order not to be branded as an antilabor judge?

Mr. HARRIS. I do not think there is any percentage.

Senator ERVIN. Well, why are you doing it then?

Mr. MEANY. Senator, we did not go over the cases where there was unanimous opinion in the circuit court where there was no contention. We took the cases where there was contention, division, and where division was such that the litigants went to the Supreme Court and in those cases he struck out completely.

Senator ERVIN. Well, you know, that reminds me of a story. We had a State judge down in North Carolina named Judge McCorkle who was appointed to fill a vacancy and he served about 5 months. He had one appeal during that 5 months and the Supreme Court of North Carolina affirmed it and ever after that Judge McCorkle would brag that during his entire service on the bench he was only reversed one time. He made that statement one time in the presence of Judge Frank Armfield and Judge Armfield said, Judge McCorkle, if I had such a sorry record as that I would not go about bragging on it. I would try to conceal it. Judge Armfield said it does not prove anything except you have not got any more sense than the Supreme Court of North Carolina and if I did not have any more sense than them I would not go about bragging about it.

So, Mr. Harris, you cannot cite but this one case, Gissel Packing Co., in the labor-management field that was written by Judge Haynsworth and which you cite to show that he is anti-labor, is that true?

Mr. HARRIS. That was a per curiam. It followed his earlier opinion in *Logan*, in which he did write the opinion.

Senator ERVIN. It is the same point involved and it was a point of

law that was not settled by the U.S. Supreme Court until about the last decisions handed down at the last term, about June.

Mr. HARRIS. Well——

Senator ERVIN. And that was a question as to what circumstances cards should be counted instead of having a secret election.

Mr. HARRIS. The Supreme Court said it had been settled about 15 years before the other way from the way Judge Haynsworth thought, and every other circuit court that considered the opinion thought the same, too. It was only this court, and only by a divided court, that departed from the Supreme Court decisions.

Senator ERVIN. The Supreme Court in that case in an opinion written by Chief Justice Warren held that all the other decisions that it had anything to do with on that point had been decided erroneously and it adopted a new rule.

Mr. HARRIS. No.

Senator ERVIN. Which was proclaimed for the first time about June of this year.

Mr. HARRIS. No, Senator; that isn't at all so.

Senator ERVIN. And it not only did that but said they had adopted a new rule not on the basis of what anybody suggested except what was mentioned in the oral arguments.

Mr. HARRIS. That isn't at all an accurate description of the case. It isn't even a remotely accurate description.

Senator ERVIN. I read the opinion and I think I understand it.

Mr. HARRIS. It said it was following the *Arkansas Oak Flooring* case which was decided about 15 years ago. It did not say it was breaking in new law. It said it was following the long-established law that it and all of the circuits except the fourth circuit had followed.

Senator ERVIN. Judge Warren said that they were clarifying this law so they could understand it in the future and they put an entirely different interpretation on it from what had been placed in scores and scores of circuit court cases. But we needn't argue about that because I can get the records and put them in the record.

Now, you say you didn't review the number of cases in which Judge Haynsworth joined those that decided in favor of unions.

Mr. HARRIS. I said that we did not——

Senator ERVIN. And I will tell how many there are if you want to know.

Mr. HARRIS. I said that we did not pull out all of the decisions or any of them in which the court below was unanimous and it had not gone to the Supreme Court because we regarded those cases as—well, they are probably less significant, they are probably clearer cases, the sort that Judge Walsh spoke of this morning as the 90 percent of the cases which were pretty much open and shut one way or the other.

It seemed to us that the significant cases were those reviewed by the Supreme Court or on which the lower court was divided.

Senator ERVIN. Well, there are 37 cases that I will put in the record later in which Judge Haynsworth participated and in which he participated in the decision in favor of the unions involved. So it is rather queer to me that you picked out just the 10 cases.

Mr. HARRIS. The statement that I picked them out, Senator, is wholly unfounded.

Senator ERVIN. But you ignored the 37 that he decided in favor of unions.

Mr. HARRIS. The 10 cases we picked out are all of his cases that went to the Supreme Court. They are not, as you imply, selected on any basis of making Judge Haynsworth look bad. They are all of his cases that were reviewed by the Supreme Court. The other cases that we discussed are all of those in which his court was divided. There is absolutely no——

Senator ERVIN. Can you tell me——

Mr. HARRIS. There is absolutely no factor of our selecting those cases involved and that is exactly why we did it that way, so that this false accusation could not be made and sustained.

Senator ERVIN. Well, who is making a false accusation?

Mr. HARRIS. You are, sir.

Senator ERVIN. I am not. I am saying that when a judge votes to sustain the union side of the case 37 times as against 10 other cases, he indicates to me that he must be a pretty fair judge unless you think that a judge ought to decide 100 percent of the cases in your favor.

Now, can you tell me a single case in the labor field that the Supreme Court found error in that Judge Haynsworth himself wrote except this one case?

Mr. HARRIS. That is the only one he wrote that ever went to the Supreme Court.

Senator ERVIN. Let's see what that case involved.

Mr. HARRIS. But I don't agree with what seems to be your conclusion and Senator McCellan's that a vote on a case is of no significance if the man doesn't write the opinion, and the *Darlington* case which was a 3-to-2 decision, Judge Haynsworth was one of the three and I would say his action in voting with Judge Bryan in that case is just as significant as if he had written the opinion. And I think that is true in all of these other 10 cases.

Senator ERVIN. I agree with you but I do know, having sat on an appellate court, that a judge doesn't necessarily have to agree with every word that is said in an opinion. If he agrees with the results of the opinion, he goes along with the results. And so, if you want to get the judge's own philosophy, I would say the best way to get it is to get it out of his own language.

Now, the *Gissel* case involved the question of counting cards and soliciting elections, didn't it?

Mr. HARRIS. Yes.

Senator ERVIN. And that has been a field in labor law concerning which there has been great controversy; hasn't there?

Mr. HARRIS. There has been a great deal of controversy over when and in what circumstances the Board should order recognition on the basis of a card check. I would say that all of the courts except the fourth circuit have said that the Board could do it where there have been substantial employer unfair labor practices that probably prevent the holding of a fair election. Only the fourth circuit said that you can never order recognition on these cards.

Senator ERVIN. Well——

Mr. HARRIS. But there has been a lot of controversy and a lot of gradations of opinion; yes.

Senator ERVIN. Yes. And as a matter of fact, when the Wagner Act was passed, it provided that you could determine whether a union represented a majority of the employees in an appropriate bargaining unit either by a secret election or by some "other means." Didn't it say that, the Wagner Act, in effect?

Mr. HARRIS. I think it did. I don't have it with me.

Senator ERVIN. Then, when the Taft-Hartley law was passed in 1947, Congress amended the Wagner Act in that respect and cut out the reference to any other means, and left it standing as far as the verbiage of the act was concerned as to whether the recognition was to be based on secret election, didn't it?

Mr. HARRIS. No, Senator. What it said was that the Board can certify only on the basis of an election. It did not say it couldn't order recognition and the Supreme Court after reviewing the legislative history concluded that it had not meant to change the Wagner Act except as respects certification.

Senator ERVIN. I know, but don't you know there are a great many people who contended and a great many people still contending that when the Congress amended the Wagner Act and provided for the certification of the union chosen in a secret election, that is was intended to outlaw any other method of determining whether a union had been selected as the collective bargaining agent by the majority of the employees?

Mr. HARRIS. That is the view Judge Haynsworth took in Logan. No other court of appeals took it, nor did the Supreme Court take it.

Senator ERVIN. Well, there has been a great controversy about it nevertheless, hasn't there?

Mr. HARRIS. Well, the Supreme Court because of this conflict among the circuits took up the issue again and——

Senator ERVIN. Yes, and finally set the matter to rest as far as they could in June of this year, about June.

Now, in this packing company case that the Supreme Court reversed, the Fourth Circuit Court of Appeals held that they could not count the cards, didn't they? In other words, they would have to have a secret election.

Mr. HARRIS. They held the Board couldn't order——

Senator ERVIN. Couldn't——

Mr. HARRIS. Couldn't order recognition.

Senator ERVIN. Couldn't bargain collectively with the union.

Mr. HARRIS. Yes, sir.

Senator ERVIN. And the Supreme Court of the United States reversed it. And the Supreme Court said just exactly what Senator McClellan read awhile ago:

> Despite our reversal of the Fourth Circuit below, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter.
>
> While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order without need of inquiry into majority status on the basis of cards or otherwise in exceptional cases marked by outrageous and pervasive unfair labor practices.

Now, if those words mean anything, they mean the Supreme Court found that while they had refused to validate the general use of har-

gaining cards, that they had said the bargaining cards could be used to determine this question in exceptional cases where there were outrageous and pervasive unfair labor practices.

Now, that case shows that the fourth circuit had two objections to the use of authorization cards. First, as contrasted with an election, the cards cannot accurately reflect the employees' wishes and, second, the cards are too often obtained through misrepresentation and coercion in an election that would follow.

Now, Mr. Harris, don't you agree that a secret election conducted under the auspices of the National Relations Board is a more accurate way to determine the will of the employees of the particular union?

Mr. MEANY. That was not the question before the Court in the *Logan* case. The question before the Court was could the Board order an election, could the Board take a card check and give recognition where there were unfair labor practices that had prevented a fair election. That is what was before the Court.

Senator ERVIN. Mr. Meany, that is not the question I am asking.

My question to Mr. Harris is: If you don't think that the most accurate way to learn the wishes of employees in an appropriate union or the wishes of the voters in a political election is to let them cast their votes in a secret ballot.

Mr. HARRIS. Generally speaking, yes, if there hasn't been conduct either by the employer or the union that tends to coerce the employees and prevent a fair election.

Senator ERVIN. Now, there are cases that show that on this question coercion sometimes almost decides it; doesn't it? Has it not been revealed in many cases that the union resorted to coercion to induce the people to sign the cards.

Mr. HARRIS. I would say there are about, sad to say, about 20 cases of employer coercion to every one of union, but there are some cases where unions have been found to have coerced employees.

Senator ERVIN. And so the fourth circuit said they would not take blanket use of cards to determine whether the union was entitled to be recognized as the representatives of the workers in preference to a general election where there were allegations of use of coercion in obtaining cards. Now, isn't that what that decision held?

Mr. HARRIS. Well, there were a good deal more than allegations. The Board has found that there were, and the court circuit found that there was evidence to support the Board. The issue as the Supreme Court put it is this:

> Remaining before us is the propriety of a bargaining order as a remedy for an 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside.

There is a typographical error in our statement at the top of page 13. In that second line the quotation should be "made the holding of a fair election unlikely." It says "unfair."

If I may, Senator, the Court then went on to say, and this bears upon what you said earlier:

> We have long held that the Board is not limited to a cease and desist order in such cases but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status.

And the Court then went on, and I will skip a bit, but they point out if they don't do this:

> The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires.

Senator ERVIN. Mr. Harris, these principles ordinarily apply in a case where there has been an election and where the majority of the employees in the unit have voted against the union; aren't they?

Mr. HARRIS. It might be that——

Senator ERVIN. Yes; that is where it ordinarily arises.

Mr. HARRIS. The court says that it is facing both the question where the employer unfair labor practices made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside. I think the four cases that were up there were both sorts.

Senator ERVIN. Well, where the National Labor Relations Board compels a union to be recognized on the basis of a card count after there has been a secret election held under the direction of the National Labor Relations Board, there is a very real danger that they will certainly recognize a union which is not the choice of a majority of the employees. Is that not true?

Mr. HARRIS. The Board has to have an adequate basis for thinking that it is the choice of a majority or was before the employer coerced some of them into changing their mind.

The courts have held that where the union never had a majority, it is not proper to order recognition. I believe the Board tried to do that once or twice but the courts have not sustained it.

Senator ERVIN. Yes; now, in this *Logan* case on which the *Gissel* case is based, Judge Haynsworth said this:

> As the affidavits tendered the employer in this case indicate unsupervised solicitation of cards may also be accompanied by threats which a union has the apparent power to execute, few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed.

I will ask you if in the *Logan* case it was not claimed that the organizers had told the employees in effect if they didn't sign these cards asking for an election that they would lose their jobs when the union took over as the bargaining agent?

Mr. HARRIS. I think there was some testimony from the employer to that effect. Of course, it isn't very likely that in one of these mills the union is ever going to have any such power and it would be illegal for the union to do what you have just described.

Senator ERVIN. Well, what you are fundamentally objecting to was the fact that Judge Haynsworth held in the *Logan* case that where there was evidence indicating that the organizers of the union had practiced coercion in getting the employees to sign these cards, that he would not accept the cards, that the court would not accept the cards, and the National Labor Relations Board ought not to accept the cards as a basis for compelling the employer to deal with that union as a representative of a majority when the majority had voted against the union in an election.

Now, that is the case; isn't it?

Mr. HARRIS. No, Senator; I don't think so, but I suggest that as you said earlier, these cases can be put into the record.

Senator ERVIN. But do you claim that that kind of ruling is antilabor?

Mr. MEANY. The ruling was that an employer would not be required under any circumstances to recognize the union on the basis of a card check and the Supreme Court did not agree with that ruling.

Senator ERVIN. Well, Mr. Meany, your words disagree with what the Supreme Court said on that. The Supreme Court said the fourth circuit looked over the possibility of imposing a bargaining order without means of inquiry into the majority status on the basis of the cards or otherwise in exceptional cases marked by outrageous and pervasive unfair labor practices.

Mr. HARRIS. The fourth circuit did say that, but no such case has ever come before it. It has never found this exceptional case to exist. And actually I think it went too far in that hypothetical. I don't think it could regardless of the union's majority properly order bargaining under the applicable decisions. But the fourth circuit has never found any employer conduct to be so heinous that it should act under this language.

Senator ERVIN. Well, I will have to disagree with your conclusion that a case that holds that the union is not recognized as a bargaining agent where the union has been rejected in secret election, and where there is evidence or indication that the cards were signed in many cases by coercion practiced upon them with organizers, is antiunion.

I think that is just protecting the rights of the employees themselves not to be recognized by an agent they haven't chosen to be their agent. This case is prolabor.

Mr. HARRIS. I think the opinions speak for themselves, Senator.

Senator ERVIN. Now, the record shows in the *Gissel* case and in the *Logan* case that the fourth circuit had two objections to the use of those cards. First, as contrasted with an election, the cards cannot accurately reflect the employee wishes. And, second, the cards are too often obtained through misrepresentation and coercion. The fourth circuit was supported by scholarly criticism of the Board's reliance on these cards.

See the comments in the "Union Authorization Cards" article in 75 Yale Law Journal, page 805, 1966, and an article by Browne entitled "Obligation To Bargain on Basis of Card Majority," 3 Georgetown Law Review, 334, 1969. See the criticism by circuit courts which have rejected the Board's rule that the cards will be counted unless the Solicitor's statement amounted to an assurance that the cards would only be used for an election; see *National Labor Relations Board* case against *S.E. Nichols and Company* (380 Fed. 2d, 438), second circuit, 1967; *Engineers and Fabricators, Inc.*, versus the *National Labor Relations Board* (376 Fed. 2d, 482) in the fifth circuit decided in 1967, and by other circuits which criticized the Board for applying its rules mechanically. This rule for which you are contending was rejected by the first circuit in the case of *National Labor Relations Board* against the *Southbridge Sheet Metal Works, Inc.* (380 Fed. 2d, 851), first circuit, 1967; in *National Labor Relations Board* versus

the *Swan Super Cleaners, Inc.* (384 Fed. 2d, 609), in the sixth circuit in 1967; by the *National Labor Relations Board* versus the *Dan Howard Manufacturing Co.* (390 Fed. 2d, 304), the seventh circuit in 1968; by *Furrs, Inc.*, against the *National Labor Relations Board* (381 Fed. 2d, 562), in the 10th circuit in 1967; by *UAW–CIO* against the *National Labor Relations Board* (392 Fed. 2d, 801), District of Columbia Circuit, 1967.

So it appears that the views of the fourth circuit were in harmony with the views of many of the circuit courts of appeal.

Mr. HARRIS. That material you have been reading, Senator, deals with a quite different issue than the point of decision there and the point of decision in the Supreme Court. It deals with the question of whether, where there are no employer unfair labor practices, it is nevertheless proper to order recognition upon the basis of a card check.

The CHAIRMAN. We will have to have order.

Senator ERVIN. There is not much use in our discussing our disagreement about the meaning of those decisions because they can also be put in the record. So the only case that you have written by Judge Haynsworth, that you say shows him to be antilabor, is just one decision out of 47 or 48 decisions he participated in.

Mr. HARRIS. We think it doesn't matter whether he wrote the opinion or not. Now, in the 10 cases where he was reversed by the Supreme Court, and I don't know of any other judge that has got that poor a batting average in the labor field, he happened to write only one decision.

We also discussed the cases where there was a division of opinion in the lower courts. I don't know how many of those he wrote. But that would appear in our memorandum from page 16 on.

Senator ERVIN. Well, I don't think you strengthen your argument very much on that basis because he decided for the union in 37 cases out of 47, and if I could have won 37 cases out of 47 when I was practicing law I would have thought I was some lawyer.

Now, Mr. Meany, the *Darlington Mills* case really arose in 1956, didn't it?

Mr. MEANY. Yes.

Senator ERVIN. And Darlington Mills began operations back in 1886, when Grover Cleveland was serving his first year of his first term as President of the United States?

Mr. MEANY. I don't know.

Senator ERVIN. Well, that is a fact.

Mr. MEANY. I don't remember it.

[Laughter.]

Senator ERVIN. Anyway, the Darlington Mills never was much of a successful financial venture, was it?

Mr. MEANY. I don't know whether it was, or not.

Senator ERVIN. Well, don't you know it failed in 1937?

Mr. MEANY. No; I did not. I am sorry to hear that.

[Laughter.]

Senator ERVIN. You don't know that? You don't know that the Darlington Mills failed in 1937?

Mr. MEANY. No; I didn't.

Senator ERVIN. Well, do you know very much about the background of this case?

Mr. MEANY. About these cases; yes, I do. I don't know—I can't go back to 1886 but I do know what happened in the last 10 years down there.

Senator ERVIN. I am not asking you to go back to 1886. I just wanted to know if you had learned the fact is that the Darlington Mills had a very rocky road economically?

Mr. MEANY. I don't know. I know the people that worked for the mill had a very rocky road.

[Laughter.]

Senator ERVIN. But the mill, itself, had a pretty rocky road. It went into bankruptcy in 1937 and was reorganized only because Milliken took stock in payment of debts. It managed to survive during the Second World War and the Korean conflict, and then it got into very bad shape and it called in a firm of engineers to tell them what they had to do in order to remain a viable economic entity. And the engineering firm advised a program which involved the installation of new machinery throughout the mill, and other things, and the mill was on the point of carrying out the program which the engineers said was the only thing that would keep them in existence. Then, the organizers appeared upon the scene and they told these people that if they would join the union, the union would keep them from carrying out this program, and they had the election and the union won by six votes.

Now, the Milliken Co. were not the sole owners of Darlington. They had 200 stockholders that had no connection whatever with Milliken in any way. They had a board of directors that had three directors that had no connection with Milliken in any way. After the union carried the election, these people from their standpoint decided that they could not make a success because the engineers had advised them that they must carry out this program in order to operate profitably and the union had pledged they would not permit the program to be carried out.

So they had a meeting of the directors, and the directors discussed the economic aspects of the matter and they decided they had better salvage what they had in the mill and go out of business. They recommended that action to the stockholders and the stockholders met and virtually all of these 200 stockholders who had no connection with Milliken voted to go out of business, to salvage what they had in the mill because they didn't believe they could operate.

And so they closed the mill, closed it out entirely, sold all of the machinery at auction and went out of business.

Then the labor charge was filed and here is what the trial examiner found on the hearing:

> The factors cited were sufficient to support the decision to terminate operations. Certainly it cannot be said that such a decision could not reasonably or even unreasonably but credibly be based on these factors.

Nevertheless, the trial examiner concluded that he could not hold that the decision to close the plant.

The CHAIRMAN. There is a rollcall vote. We will suspend now and be back.

Senator ERVIN. I will finish this.

Was based on the economic factors justifying its closing because the decision to close would not have then been made if it had not been for the union's victory.

(Short recess.)

Senator ERVIN. Senator Eastland said we could proceed. The committee will come to order.

I was speaking, when we adjourned, about the financial status of Darlington. I also would like to call attention to this statement from the findings of the National Labor Relations Board. It was brought out that Darlington had averaged less than 3-percent return on invested capital in the previous 5 years, including the current year in which a loss of $40,000 was expected, and that if market prices did not rise and costs increased, a loss of $240,000 could be anticipated in the following year.

So the board of directors and the stockholders voted to dissolve and go out of business, upon the ground that the foreseeable additional costs resulting from the arrival of the union would be simply too much for the corporation to bear.

Then the union filed an unfair labor charge alleging that it was unfair labor practice for Darlington to go out of business.

On October 16, 1956, General Counsel filed a complaint on the basis of the charge. Hearings were held by the trial examiner, Lloyd Buchanan, beginning in January.

In April, on April 30, 1957, he filed an intermediate report in which he held that Darlington had sufficient economic causes to justify Darlington going out of business, but that Darlington had committed an unfair labor practice because it went out of business at the specific time it did go out of business because of the union victory.

He also found that Darlington would have had to have gone out of business anyway in a relatively short period of time and for that reason there could be no reinstatement remedy.

Then the case went before the National Labor Relations Board and rested in peace for about 9 months. Then the National Labor Relations Board, on December 16, 1957, remanded the case to the trial examiner. Two members of the National Labor Relations Board dissented from that, holding that the case should be dismissed.

Then there were hearings on the remand and then for the first time Deering Milliken & Co., was brought into the case as a party.

The trial examiner filed a supplemental immediate report on December 31, 1959, and he found that Deering Milliken and Darlington did not occupy a single employer status and recommended dismissal of the case as to Deering Milliken.

The Board thereupon, instead of acting upon the matter on January 9, 1961—that is, almost 6 years after the case originated—with two members of the Board dissenting, ordered a remand to take evidence about the press release concerning the merger of Deering Milliken & Co. and the Cottswood Manufacturing Co.

This was the time that Deering Milliken went into the Middle District Court of North Carolina and asked for an injunction against further hearings or the remand on the alleged ground that the National Labor Relations Board had not performed its duty to decide the case within a reasonable time.

The U.S. District Court for the Middle District of North Carolina granted a total injunction forbidding the taking of evidence of any kind on rehearing, and the case was appealed to the Fourth Circuit Court of Appeals and the Fourth Circuit Court of Appeals in an opinion written by Judge Haynsworth stated that they did think that the National Labor Relations Board had not performed its duty of deciding the case within a reasonable time, but nevertheless modified the injunction to permit the trial examiner to take the evidence concerning the matter which the union had asked be taken.

Now, Mr. Meany, you don't claim that there is any bias in Judge Haynsworth's opinion in that first case, do you, the 1961 case?

Mr. MEANY. I don't know.

Senator ERVIN. Because the union won that.

Mr. MEANY. I don't know. You lost me about 20 minutes ago. [Laughter.]

You read a 30-minute speech and then you want me to express an opinion on it.

Senator ERVIN. I will ask you again, Mr. Meany, do you claim there was any bias in Judge Haynsworth's opinion in the first case?

Mr. MEANY. You argued the case before the Supreme Court and now you are still speaking for your client. The lawyer from the other side is here and if you want to retry the case, try it with him.

Senator ERVIN. Mr. Meany, I am not speaking for my client. I am speaking as a U.S. Senator. I have had no connection with this case since 1964.

Since I can't get a response, I will ask one of the attorneys, do they contend that Judge Haynsworth did anything wrong?

Mr. MEANY. We will have to look at that record, I think. It will take quite a while.

Senator ERVIN. Well, all I can say, then, Mr. Meany, is that he decided the motion in favor of the union.

Mr. HARRIS. I thought Judge Haynsworth's own summary of that case was a fair summary and he permitted the Labor Board to reopen the case but limited the scope of its reopening.

Senator ERVIN. Well, he allowed them to take evidence bearing on the point which formed the basis of the union to remand the case.

So that was the union victory.

Mr. HARRIS. Well, I would say it was sort of a 50–50. He was very critical of the long NLRB delays in that case and very sympathetic with the long delays the company had been put through.

The opinion contracts rather notably with his attitude on the school closing in Prince Edward County where he showed absolutely no sympathy for the children who had for a whole generation been denied integrated schools.

Senator ERVIN. Well, Mr. Harris——

Mr. HARRIS. If you want to make something of it, we can make something of it. I don't really think that this kind of colloquy is particularly useful because the decisions speak for themselves.

Senator ERVIN. Well, we might disagree about that. I was just trying to find the basis of your claim that there is an antiunion bias. Now, this other case you talked about, United States against Seaboard Airline Railroad Co., is one of the two cases you mentioned as having been written by Judge Haynsworth.

Mr. HARRIS. I said, Senator, that I consider that of no significance, that I just included it to complete——

Senator ERVIN. The issue was whether as the Government contended, train movements in a switching yard were train movements rather than switching movements within the meaning of the Safety Appliance Act. That is all that was involved, wasn't it?

Mr. HARRIS. I have not attached any significance to it.

Mr. MEANY. We didn't think that was an important labor case.

Mr. HARRIS. I included it just in order to include in the compilation any case that anybody could say was a labor case that went to the Supreme Court.

Senator ERVIN. I just wondered why you mentioned it.

Mr. HARRIS. That is why.

Senator ERVIN. Yes. Well, I don't know that it is necessary to go into these cases. I just was trying to find the basis, but as far as——

Mr. MEANY. I will say "Amen" to that.

Senator ERVIN. I will go into some other cases which show that the decision of 1963 was in harmony with the overwhelming weight of authority in the circuit courts of the United States at that time. I cite these cases to show it.

Carolina Mills case, 167 Fed. 2d, 212. Here this company is down in Texas without business. Incidentally, Judge Hutchison gives a very good picture in one paragraph of how the NLRB operates. He says this is another of those dreary reviews of Board proceedings presenting the question not whether the findings of fact made by the Board as triers of the facts or the evidence presented by the Board as the prosecution in support of charges filed by the Board as complainant has been fairly, impartially, and justly arrived at but whether they are supported by substantial evidence on the record considered as a whole.

It presents the usual picture of supporting findings arrived at by a process of quite uniformly crediting testimony favorable to the charges and as uniformly discrediting testimony opposed.

Judge Hutchison held in this case that a portion of Carolina Mills had in good faith gone out of business and the Board cannot therefore require that the company stay in business in order to give employment.

In the New England *Web* case which occurred somewhere in New England, not in the sinful South, an employer closed the mill after the union won the election. It was reported in 309 Fed. 2d, page 696, and it says on page 701:

While it is true that there is no evidence in the record that the company had formally considered closing down operations prior to the advent of the union, it it equally true that the officers felt that some decisive measures were necessary to avert the rapidly deteriorating economic position of the company. The decision to change the mode of compensation was significant evidence of this. When this decision—far from immediately ameliorating the company's economic position—caused a walkout and a strike by the weavers and their subsequent unionization, then this was assuredly a new factor to be considered by the New England Web management in determining a future course of action. Viewed in the context of the shaky financial status with which

New England Web was confronted, a decision—at that point—to go on no more cannot be said to be inherently implausible. As was stated by the court in *NLRB.* v. *Lassing*, *supra:* "The advent of the union was a new economic factor which necessarily had to be evaluated by the respondent as a part of the overall picture pertaining to costs of operation" 284 F. 2d 781 at 783.

I will not read the other cases at this time, but the *Tupelo Garment Co.* case, 122 F. 2d at 603, holds that businesses have the right to take into consideration the economic impact of the advent of the union in determining whether they should close. The same thing was also held in *Jay's Food, Inc.*, case 202 F. 2d 317.

Also in the case of *E. S. Kingsford*, 313 F. 2d. 826.

Also the *R. C. Mahon Co.* case, 269 F. 2d page 44.

Also the same holding in *Adkins Transfer Co.*, 226 F. 2d at 324.

Also in the case of *New Madrid Manufacturing Co.*, 215 F. 2d 908, and the *Rapid Bindery* case, 293 F. 2d 170.

All of those and other cases I could cite were in complete harmony with the ruling in the *Darlington* case by the 3-to-2 decision in which Judge Haynsworth participated in 1963.

Furthermore, all they did in the *Darlington* case was to hold that on the record which came from the National Labor Relations Board the Fourth Circuit Court of Appeals could not enforce the decision of the National Labor Relations Board. The case was then appealed to the Supreme Court of the United States and the Supreme Court of the United States held the same thing because it said that the case had not been tried on all of the issues necessary to make a decision, and therefore remanded it to the National Labor Relations Board.

The next time the case came up was after the decision in the NLRB in favor of the Textile Workers of America and Judge Haynsworth joined in the opinion in favor of the Textile Workers Union.

In view of these facts, and in view of the fact that in virtually 79 percent of the labor cases that came before the court in which Judge Haynsworth sat he ruled in favor of unions, I can's see the slightest indication of any antilabor bias on his part.

It is time to recess, unless somebody wants to proceed further.

Senator HART. I certainly shan't delay the recess.

Your testimony, Mr Meany, has been predictable. It is direct, with no ambiguity, and reflects deep conviction from a segment of the American community that I hope will always retain confidence in the rule of law.

I regret very much to see any action which would be interpreted by any principal segment of our society as raising serious doubts as to the accessibility to them of courts which would be understanding and sympathetic. And in many things I think that is an overriding question here.

There is unrest and suspicion. Volatile leadership finds it relatively easy to persuade people to take to the streets if the courts will not listen.

Well, I think the Warren Court listened attentively and decided prudently and I am sure that has been helpful to the constructive leadership in several segments of our society where the intensity of doubt is greatest among white people, blacks, labor.

It doesn't surprise me a bit that if they do read the box score, the nominee was appealed seven times on direct labor cases, three additional cases that may be labeled also as labor cases, that on those 10 times he was held by the Warren Court to be wrong. He did manage to pick up one justice's vote out of I guess 80 or 90 Warren Court votes.

It doesn't surprise me a bit that you would be in here with the strong testimony you have voiced.

I attempted the other day with the nominee to develop his understanding of what a strict constructionist was. Because of restraints that I think are proper to impose, it is hard to ask the nominee how he feels about specific decisions, and in a way it inovlves specific decisions when you ask him how he feels about the Warren Court. But the batting order of decisions that you have recited rather dramatically suggests that there is a remarkable difference between the attitude of this nominee and the position of the Warren Court.

In that respect I think your testimony has been very helpful to some of us.

Senator ERVIN. One question I want to ask.

Mr. Harris, how many of these cases that were appealed from the Fourth Circuit Court involved the simple question as to whether the evidence before the National Labor Relations Board sustained their findings and conclusions?

Mr. HARRIS. That went to the Supreme Court, sir?

Senator ERVIN. Yes.

Mr. HARRIS. None of them.

Senator ERVIN. None of them.

Mr. HARRIS. The Supreme Court, as you know, doesn't normally take cases of that sort.

Senator ERVIN. It does pass on those cases, though.

Mr. HARRIS. There were some evidentiary, questions, but the Supreme Court is very reluctant to take a case of the sort you described and none of these were that sort.

Senator ERVIN. But it does have jurisdiction in such cases.

Mr. HARRIS. Oh, yes.

Senator HART. One very narrow thing for the clarification of the record. I think Mr. Harris would probably be in the best position.

On Tuesday Senator Tydings was discussing with Judge Haynsworth the matter of the Carolina Vend-A-Matic and an effort was made to establish when public knowledge first developed of the interest of the judge in that company. Specifically the request has been made to clarify for the record the question of when the Textile Workers Union first had knowledge of this interest.

Mr. HARRIS. Yes. I remember that colloquy. It struck me at the time because Judge Haynsworth—the answer that he gave to that question was not an accurate answer. I have it here.

Senator HART. What page is it on?

Mr. HARRIS. Pages 93 and 94 of the transcript of the record.

Senator TYDINGS. When was the first time there was any public knowledge or awareness that you were an investor or stockholder in Carolina Vend-A-Matic?

Judge HAYNSWORTH. I don't think that became known until after this appointment. It became known to the people involved in this law suit, of course, in December 1963. But I don't think it went much beyond that. But the fact——

Senator TYDINGS. The first time it became a matter of public knowledge?
Judge HAYNSWORTH. It was not then known, as far as I know, except to the Textile Workers Union and the officials of Deering Milliken and the lawyers and the members of my court, and so on, but not generally known elsewhere.

That statement that this was known to the Textile Workers Union was false. The Textile Workers Union had absolutely no information of Judge Haynsworth's stock holdings at that time. I have with me a statement put out by President Pollock of that union in which he states unequivocally—this statement put out by William Pollock, president, Textile Workers Union, was put out August 24. He stated then:

Not only did the union not know of this interest in 1963,

He says—

we did not and do not know whether he was a salaried officer or whether his role was purely nominal. We did not and we do not know whether Judge Haynsworth had a large ownership interest in Carolina Vend-A-Matic or a small interest or no interest.

Furthermore, we have all, I take it, been over to the Department of Justice file on this matter. This file contains absolutely no information as to Judge Haynsworth's ownership of a one-seventh interest in Carolina Vend-A-Matic. The only information in that file is that he had been a director and had resigned in consequence of a resolution of the Judicial Conference as a director in September or October 1963. It does not contain any information as to his stock ownership. Far from containing any information, I would say it carries the impression that this was a very minor affair. Certainly that is the impression the union got from what Judge Sobeloff reported to it.

I have Judge Sobeloff's letter here dated February 18, 1964. Let me read you a paragraph of it, two paragraphs:

The circumstances of Judge Haynsworth's resignation as a director of Carolina Vend-A-Matic are also well known to us and it was prompted by a resolution of the Judicial Conference of the United States and was in no way related to Deering Milliken contracts. When Judge Haynsworth came on this board in 1957, he was a member of the board of directors of a number of corporations.

He resigned from the board of each of those corporations which were publicly owned. He did this in order to avoid any chance that someone might undertake to influence him indirectly through a corporation of which he was known to be a director.

He did not resign from the boards of two corporations. One of those two is a small passive corporation in which members of his family have an interest. It owns real estate under long-term leases and engages in no active business.

He also remained on the board of Carolina Vend-A-Matic, which is not publicly owned because he thought that the considerations which led him to resign from the boards of the other corporations were inapplicable to it and the small passive corporation.

I submit that, without saying so, this leaves the impression that this Vend-A-Matic operation was a small, minor, two-bit operation, and that there is nothing there that even remotely suggests that he had a half million dollar interest in it. There is nothing there that said he had any interest at all, though one might suspect that a judge would not be the director of such a corporation unless he did have some interest.

But there have been a number of questions here by various Senators which have assumed that the union knew in 1963 the extent of his ownership in that corporation and as I say, Judge Haynsworth stated that it did. That is not so.

Senator HART. Thank you, Mr. Harris.
Thank you, Mr. Chairman.
Senator COOK. Mr. Chairman——
Senator THURMOND. Mr. Chairman, I have no questions.
Senator ERVIN. Senator Cook.
Senator COOK. Mr. Harris, let's get into the very subject that you have been talking about because you make a distinct point in talking about Carolina Vend-A-Matic on one point and one point only, and that is that your union did not know of his one-seventh interest.
You further said, I believe, that knowledge came to your organization sometime in December of 1963.
I want to read you——
Mr. HARRIS. Pardon me, Senator. Knowledge of what?
Senator COOK. Of the fact that he had any connection with Carolina Vend-A-Matic, regardless of its interest. The point I want to make, Mr. Harris, is that you are a lawyer and I am a lawyer and you are a grown man and I hope that I am, and I want to read to you the paragraph in the letter to Judge Sobeloff of December 17.

"The *Consolidated Deering Milliken* cases were decided by the fourth circuit on Friday, November 15, 1963. On the morning of Wednesday, November 20, our union received a telephone call.

Now, here was the substance of the telephone call.

"I believe that you should know that Judge Haynsworth, who voted against your union in the *Deering Milliken* case is the first vice president of Carolina Vend-A-Matic Co. and that 2 days after the decision, et cetera.

Now, you are making the distinction between a one-seventh interest that became worth a half million dollars and you are ignoring the fact that your union did know on the 20th of November that he was the first vice president of the company, and I still contend, Mr. Harris, as I did yesterday, that in regard to the colloquy of the Senator from Massachusetts and the Senator from Indiana, we weren't talking about how much interest he had or whether he had shares, but whether he had a vested interest, whether he was an officer, and we are now down to the point that you don't know that he had a one-seventh interest.
You knew on November 20, your union, that he was the first vice president of this corporation, is that not correct?
Mr. HARRIS. Well, sir, I am a lawyer for the AFL–CIO. This letter was to the Textile Workers Union. I was later consulted by the Textile Workers Union about this matter and was familiar with it at that time. But not this early. But I would say that the Textile Workers Union had an anonymous communication on December 17 that he was the first vice president.
Senator COOK. November, they had the——
Mr. HARRIS. Oh, yes.
Senator COOK. The communication on November 20.
Mr. HARRIS. You are correct.
Senator COOK. Whether it is your union or whether it was the union involved in the *Deering Milliken* case, the union knew that he was the first vice president of the corporation on November 20.
Mr. MEANY. They knew that by an anonymous telephone call.
Senator COOK. That is correct.

Mr. MEANY. After the decision was made. Now, the anonymous telephone call also said that he had accepted a bribe. So would you say that the union knew that?

Senator COOK. No, but the union wanted to find out about it.

Mr. MEANY. They wanted to find out, and then afterward the union then came forward and said that under further information they found out the charge was not true.

Senator COOK. But, Mr. Meany, they also had the opportunity, once they found out he was the first vice president of a corporation, their lawyers had the opportunity to make a motion for a new trial at the fourth district level, which they never did. They had an absolute opportunity to make it part of the record in the writ of certiorari to the Supreme Court of the United States, and they never did.

Why didn't they?

Mr. MEANY. That does not absolve Judge Haynsworth for sitting on the case. He knew he had an interest.

Senator COOK. You are arguing the fact that he knew and yet this union—the inaction of the counsel of the union in not bringing it in——

Mr. MEANY. That is right, and the fact they failed to make this motion does not absolve Judge Haynsworth. He knew he had a one-seventh interest.

Senator COOK. The argument is why didn't this union have proper representation?

Mr. MEANY. The union is not on trial.

Senator COOK. Organized labor is saying this man has been unfair.

Mr. MEANY. That is right.

Senator COOK. And the point is maybe some attorney for organized labor is trying to make up for the fact that he didn't look after his union.

Mr. HARRIS. I would say that the union did at that point exactly what it should have done.

Senator COOK. You mean it failed to protect the interests of the TWUA by not asking for a new trial at the fourth district level and by failing to make its part of the record to the Supreme Court of the United States.

Mr. HARRIS. It brought this matter to the attention of the chief judge.

Mr. MEANY. The chief judge.

Mr. HARRIS. And said what about it.

Senator COOK. And they sought the absolution, didn't they?

Mr. HARRIS. And the chief judge conducted some sort of inquiry and then he wrote the union the letter which I have read to you.

Senator COOK. Now, you said some sort of inquiry. Are you also saying that Judge Sobeloff acted improperly in this matter?

Mr. HARRIS. No; but what I am saying is that this letter which the union then received from Judge Sobeloff, which was written on the basis of information he had received from counsel for the two companies, Carolina Vend-A-Matic and from Judge Haynsworth, did not state that Judge Haynsworth owned a 15-percent interest in this business, and I say further it left the impression that this was a very small scale operation.

Senator COOK. But, Mr. Harris——

Mr. HARRIS. And not anything of any consequence.

Senator COOK. But, Mr. Harris, the union did know he was a first vice president.

Mr. HARRIS. If the union had known that he was a 15-percent owner, that his ownership amounted to something in the order of $450,000, certainly at that point it would have had to consider whether it was going to make any motion for his disqualification or rehearing or whatnot, but it did not know that.

Now, the person who misconducted himself was not the union but Judge Haynsworth. He had two options, it seems to me, as an ethical and scrupulous judge. One was to disqualify himself without more. And he should have done that, of course, before the case was argued.

The other was to tell the union of this interest.

There has been much made here by Judge Walsh and other people about what judges do when they own a small piece of stock in a big company that is a litigant, but what they do is tell counsel and say, "Do you think I ought to sit or don't you think I ought to sit?"

That has got nothing to do with Judge Haynsworth, what he did here. It would have been one proper course open to him, but he didn't take it.

Senator COOK. Mr. Harris, you also admit, on the other hand, that Judge Haynsworth was known to the union on November 20 and prior to that time as the first vice president of Carolina Vend-A-Matic.

Mr. HARRIS. No. There is a slight inaccuracy there, Senator.

Senator COOK. All right. What is the inaccuracy?

Mr. HARRIS. The inaccuracy is the one that Mr. Meany pointed out. At that time it had an anonymous phone call which alleged that and which also alleged that the Judge had taken a bribe. I don't see how you can say the union knew he was the first vice president at that point unless you are also prepared to say that the union knew he had taken a bribe.

Now, of course, that doesn't follow at all.

Now, after they got this call the union did do one thing besides writing Judge Sobeloff. They got a Dun & Bradstreet on this company. They got a Dun & Bradstreet report, which I have here. The Dun & Bradstreet report doesn't say anything about the ownership of the company. Actually two Dun & Bradstreets came in. The first one that the union got, and this is rather interesting, too, in view of some of Judge Haynsworth's testimony. He testified yesterday that nobody knew about his interest in Carolina Vend-A-Matic, that nobody knew that he was an investor and stockholder in Carolina Vend-A-Matic, and that was why he thought it was a proper investment, that if people had known about it, they might have tried to influence him through it, but no one knew, and he further went on to testify that he had told the general manager, Dennis, not to tell people about his interest.

I will read to you a colloquy, page 131:

Senator BAYH. Was there any—was he—that is a reference to Dennis—told not to disclose this to any of the other clientele that he was dealing with in procuring business?

Judge Haynsworth. Yes; he was.

All right. The union got this Dun & Bradstreet report in 1963 after this anonymous phone call. The Dun & Bradstreet report contained certain information. It states, "Received direct from Wade Dennis, General Manager, October 8, 1963."

The first thing—well, the second thing listed on it—the first thing in the upper righthand corner, Clement J. Haynsworth, Jr., first vice president.

The Dun & Bradstreet seemed to contain an ambiguity in that in one place it said the company was founded 1950 and in another 1960. So the union asked for a correction.

The next one that came back, still bearing this:

Received direct from Wade Dennis," "C. J. Haynsworth, Jr., formerly shown as first vice president, resigned about September 1, 1963, and no one has been elected to that office.

The notation on this indicates that the union got the—the first one doesn't contain a note. The second indicates that it got it January 7, 1964.

Senator COOK. Mr. Harris——

Mr. HARRIS. So at that point they knew that Judge Haynsworth had been a first vice president.

Senator COOK. Then, Mr. Harris, I will read to you from Mrs. Eames' letter that I quoted to you just a minute ago. After the contents of the anonymous telephone call then that she set out, she said:

We immediately proceeded to do what we could to check the accuracy of this allegation. The first element checked out readily. There is no doubt that Judge Haynsworth is or was until very recently the first vice president of Carolina Vend-A-Matic Co.

Now, the point that I am trying to make, and I am not here to justify Judge Haynsworth's actions in one respect. I am only here to get the record straight, and that is that at no time after your union, after the Textile Workers Union of America, knew that he was the vice president of Carolina Vend-A-Matic did it take any action to legally protect its rights in the *Deering Milliken* case.

Mr. MEANY. Oh, yes; it did.

Senator COOK. Excuse me just a moment. It made no effort to secure a new trial. It made no effort to make the point on the case to the Supreme Court of the United States, and it made no effort to remove Judge Haynsworth when the action went back to the fourth circuit and the case was heard again in 1967. And at every one of those points it had an opportunity to do so. But it did not do anything about it until the man was nominated to the Supreme Court of the United States.

Mr. MEANY. Are you making the point that we are objecting to his nomination in order to cover up some dereliction on the part of the lawyer for the Textile Union?

Senator COOK. None whatsoever.

Mr. MEANY. What has this got to do with the fact that Judge Haynsworth sat on this case, he heard the arguments in June of 1963, he was then a director and a stockholder, a one-seventh owner of this corporation, and he voted on a decision on November 15, 1963, and he was then a stockholder and a one-seventh owner. What has the action of the lawyers subsequently got to do with our arguments that he

should have told these people, not let somebody tell them by anonymous telephone call and that he should have withdrawn from the case?

Senator COOK. The point I am trying to make, Mr. Meany, is very clear, that everybody who has testified in this case so far has tried to give the impression that the one-seventh interest in Carolina Vend-A-Matic was tantamount to a one-seventh interest in Deering Milliken, and it was not, and it is not, and rule 26 of the Canons of Judicial Ethics will specifically say a direct interest. He did not have, does not have, and never had a direct interest in Deering Millliken.

Mr. HARRIS. Senator, you are making quite a different point now, and I will be——

Mr. MEANY. He had a direct interest in the company that was doing a profitable business with Deering Milliken.

Senator ERVIN. If the Senator will yield——

Mr. HARRIS. Wait a minute, Senator, if you will. I would like to comment on what you said earlier, and the point you are making now is a legitimate point, but it is quite a different one. Mr. Pollock's letter or his statement goes into the question why the union did not pursue the question further. I have already mentioned one thing. Of course, the main reason was that it didn't know that he had a 15-percent interest. It did not know that it was a big scale operation.

I submit, again, that Judge Sobeloff's letter——

Senator COOK. To your information and knowledge, how big was the operation in regard to the Deering Milliken plant that was the contention of the law suit?

Mr. HARRIS. They didn't have any installation in Darlington that I know of.

Senator COOK. Thank you. Go right ahead.

Mr. HARRIS. But that, again, is a different point. The union did not raise this point because it didn't know that this was a $3 million operation with Judge Haynsworth having about a half million dollars of it. They thought from Judge Sobeloff's letter that it was peanuts. I get the impression from Judge Sobeloff's letter that that is what he thought.

If the union had known that this was anything on this scale, no doubt it would have considered the question further.

You make much of the fact that the union knew that he had been briefly—not briefly, he had been for quite a while, that he had been first vice president. I think that did give us the suspicion that he owned some of it but, of course, it didn't give us any notion of the magnitude either of the operation or his ownership.

Now, Judge Haynsworth, when he was testifying, said himself that he didn't consider that the significant factor was his being a director or his being vice president, that these really didn't amount to a thing, that that was purely nominal, that the significant factor was his ownership, and that is what the union did not know.

Senator COOK. Are you saying that Judge Haynsworth said this in his testimony?

Mr. HARRIS. Yes. That was his evaluation. He said if there is any question here, it doesn't really rise from my being a director or vice president but from my ownership.

Senator ERVIN. Well, Mr. Harris——

Mr. HARRIS. There was another factor. Just a minute. I haven't finished answering the question, Senator Ervin.

The union did not learn of this ownership until after—it didn't know as late as this August. When Judge Haynsworth was first appointed, he refused to answer reporters' questions about what he had owned or what it was worth. It wasn't until a diligent reporter, Mr. Eaton, went to the SEC a few weeks ago and got out the SEC records that anybody knew that he had owned 15 percent and that it was worth $450,000. That is the first that anybody knew that.

Now, you also raised the question of why the union didn't do something on the remand when the Supreme Court reversed and remanded it and sent it back. Well, as I have said, it should be evident that the union didn't know about his interest. Now, actually at that time, he no longer had the interest. He had sold out in 1964. So that when the case went back, he didn't still have it.

Senator COOK. But you didn't know that in 1964.

Mr. HARRIS. No, of course, we didn't know that.

Senator COOK. Now, let me ask you one other question.

Mr. HARRIS. And why you blame us because the judge failed to disclose what he should have disclosed, I am unable to understand.

Senator COOK. You misunderstand me. I am not blaming you. It suggest that all of a sudden we have gotten to the point of the value of this and before we were discussing the fact that he was an officer and was a director and the direct testimony from the gentlemen on the other side of the room yesterday was to the effect that he was an officer, that he was a director, and the point I am trying to make to you is that you, as a lawyer, if you knew that somebody who had sat on a case was or had been a former first vice president of a corporation, I think this would have a great deal to do with your arguments in relation to the propriety of his sitting.

Now, another point I would like to raise with you. You went to great length with Senator Ervin about the fact that he is zero and 10 in the Supreme Court of the United States.

Mr. Meany, how do you rate with the Supreme Court of the United States? Do you win 3½ to 1, or do you win 3 to 1, or win 5 to 1?

Mr. MEANY. I don't know.

Senator COOK. What is your record in the Supreme Court of the United States?

Mr. MEANY. I don't know. We don't keep a record.

Senator COOK. Well, if he decided at the fourth district level 37 cases in the union's favor——

Mr. MEANY. Oh, I don't think——

Senator COOK. And he lost 10——

Mr. MEANY. I don't think that is true.

Senator COOK. Every one of these cases stand on their own, don't they?

Mr. MEANY. I don't think that is true.

Senator COOK. If he ruled in your favor——

Mr. MEANY. If he ruled in our favor in cases that were not important—the important cases were the ones that went to the Supreme Court.

Senator COOK. Are you sure, Mr. Meany——

Mr. MEANY. I think so.

Senator COOK. Suppose the union won 37 times at the fourth district level and the corporations involved didn't feel they could take them to the Supreme Court. Are we saying that every case that doesn't go beyond the district level and get to the Supreme Court isn't important?

Mr. MEANY. No.

Mr. HARRIS. No. I would say that the dubious cases are the ones that go to the Supreme Court.

Senator COOK. The ones that there was a doubt on.

Mr. HARRIS. Or on which the lower court was divided. I think we can assume that those that went to the Supreme Court or where there was a division of opinion below were the close cases.

Senator COOK. If he has been in favor of you 3½ to 1, 37 cases in the Fourth Circuit, and 10 that you lost out on, that would be a pretty good average.

Mr. HARRIS. I don't at all accept that statement.

Senator COOK. We have to accept your statement that he is totally wrong because of the cases at the Supreme Court level.

Mr. HARRIS. My cases are listed here. There can't be any doubt that these are the 10 cases that went to the Supreme Court and he was reversed.

Senator COOK. But shouldn't you do a complete——

Mr. HARRIS. This figure of 37 that Senator Ervin threw out is based on something I have never seen and know nothing about.

Senator COOK. And you didn't research, did you?

Mr. HARRIS. What?

Senator COOK. But apparently Senator Ervin did.

Mr. HARRIS. No, I didn't research. Senator Ervin had another interest, you see. He was reading from the briefs. He was a lawyer on the brief.

Senator ERVIN. I have no interest in this except to see that a good man is appointed to the Supreme Court. Neither Darlington Mills nor Deering Milliken have been appointed to the Supreme Court. I don't even know how the Darlington Mills or the Deering Milliken people feel about Judge Haynsworth. I would think they wouldn't like him too much because he decided these *Darlington* cases against them.

Mr. HARRIS. If you will look at our statement, Senator——

Senator COOK. The point I am trying to make, if you will let me finish, is that Senator Ervin reported that there were 37 cases at the fourth circuit level when he ruled in favor of the unions or joined opinions in favor of the unions.

Senator ERVIN. If you will pardon me, I will put the cases in the record and you will have a chance to——

(The material referred to follows:)

Dubin-Haskell Lining Corp. v. *NLRB*, 386 F. 2d (4th Cir. 1967), *cert. denied* 393 U.S. 824.
Florence Printing Co. v. *NLRB*, 333 F. 2d 289 (4th Cir. 1964).
General Instrument Corp. v. *NLRB*, 319 F. 2d 420 (4th Cir. 1963).
Great Lakes Carbon Corp. v. *NLRB*, 360 F. 2d 19 (4th Cir. 1966)
NLRB v. *Marion Mfg. Co.*, 388 F. 2d 306 (4th Cir. 1968).
NLRB v. *Baldwin Supply Co.*, 384 F. 2d 999 (4th Cir. 1967).
NLRB v. *Weston Brooker Co.*, 373 F. 2d 741 (4th Cir. 1967).
Don Swart Trucking Co. v. *NLRB*, 359 F. 2d 428 (4th Cir. 1966).

Galis Electric & Machine Co. v. *NLRB*, 323 F. 2d 588 (4th Cir. 1963).
NLRB v. *Marval Poultry Co.*, 292 F. 2d 454 (4th Cir. 1961).
NLRB v. *Threads, Inc.*, 289 F. 2d 483 (4th Cir. 1961).
NLRB v. *Roadway Express, Inc.*, 257 F. 2d 948 (4th Cir. 1958).
NLRB v. *Superior Cable Corp*, 246 F. 2d 539 (4th Cir. 1957).
NLRB v. *Kotarides Baking Co.*, 340 F. 2d 587 (4th Cir. 1965).
Greensboro Hosiery Mills, Inc. v. *Johnson*, 377 F. 2d 28 (4th Cir. 1967).
Henderson v. *Eastern Gas & Fuel Associates*, 290 F. 2d 677 (4th Cir. 1961).
JNO McCall Coal Co. v. U.S., 374 F. 2d 689 (4th Cir. 1967).
Link v. *NLRB*, 330 F. 2d 437 (4th Cir. 1964).
Mitchell v. *Emala & Associates, Inc.*, 274 F. 2d 781 (4th Cir. 1960).
Mitchell v. *Sherry Corinc Corp.*, 264 F. 2d 831 (4th Cir. 1959), *cert. denied*, 360 U.S. 934.
NLRB v. *Atkinson Dredging Co.*, 329 F. 2d 158 (4th Cir. 1964), *cert. denied*, 377 U.S. 965.
NLRB v. *Baltimore Paint & Chemical*, 308 F. 2d 75 (4th Cir. 1962).
NLRB v. *Cross*, 364 F. 2d 165 (4th Cir. 1965), *cert. denied*,, 382 U.S. 918.
NLRB v. *Haynes Hosiery Div.*, 384 F. 2d 188 (4th Cir. 1967), *cert. denied*, 390 U.S. 950.
NLRB v. *Jesse Jones Sausage Co.*, 309 F. 2d 644 (4th Cir. 1962).
NLRB v. *Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958).
NLRB v. *Lester Bros., Inc.*, 301 F. 2d 62 (4th Cir. 1962).
NLRB v. *Randolph Electric Membership Corp.*, 343 F. 2d 60 (4th Cir. 1965).
NLRB v. *Winn-Dixie Greenville, Inc.*, 379 F. 2d 958 (4th Cir. 1967). *cert denied*, 389 U.S. 952.
Ostrofsky v. *United Steelworkers of America*, 273 F. 2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849.
Overnite Transportation Co. v. *NLRB*, 327 F. 2d 36 (4th Cir. 1963).
Rosedale Coal Co. v. *Director U.S. Bur. Mines*, 247 F. 2d 299 (4th Cir. 1957).
Textile Workers v. *Cone Mills*, 268 F. 2d 920 (4th Cir. 1959) .
Wirtze v. *Charleston Coca Cola Bottling Co.*, 356 F. 2d 428 (4th Cir. 1966).
Wirtz v. *DuMont*, 309 F. 2d 152 (4th Cir. 1962).
Williams v. *United States Mine Workers*, 316 F. 2d 475 (4th Cir. 1963).
NLRB v. *Edinburg Mfg. Co.*, 394 F. 2d 1 (4th Cir. 1968).

Mr. HARRIS. For all I know, there may have been 137 that he ruled against, but I do not——

Senator ERVIN. But you vote against him because of the 10 cases in the Supreme Court.

Mr. HARRIS. But I do not regard the unanimous decisions as being——

Senator ERVIN. Even if they were, you contend there is no significance if they are unanimous. If he is antiunion, why didn't he dissent on all those 100-some-odd cases?

Mr. HARRIS. I don't say there is no significance but I say the close cases are the ones where there was a division or that went to the Supreme Court.

However, the statement that we didn't analyze any of the others is not correct. If you look at our statement you will see we say that Judge Haynsworth also wrote the opinion in a number of labor cases in which they were unanimous, that the more important of those cases are summarized in one of our appendixes, as indeed they are. We didn't go through and try to tabulate whether he had ruled us 137 times, in favor of us 37 times, because I regard that as of no significance.

Senator COOK. But you do regard the fact that it is of significance if he ruled against you 10 times, just as long as those 10 times went to the Supreme Court of the United States where it is easier to find cases in the Supreme Court than it is to research some 100-odd cases or even a thousand cases at the Fourth District level.

Mr. HARRIS. That is not at all so.

Senator COOK. Because if you are going to——

Mr. HARRIS. I regard a case that goes to the Supreme Court as, (a), a doubtful one; and (b) a major one. And we were looking for some kind of objective criteria, some test to measure him against. I don't know what you can measure him against except how he has come out in the Supreme Court which shows both whether he is pro- or anti-labor, as compared with the Supreme Court, and it is quite clear that he is antilabor.

It also shows what his scorecard is in the Supreme Court. How he is at interpreting the law as the Supreme Court sees it. And when he gets reversed every time, gets the vote of one judge once, this suggests that he is way out of step with the Supreme Court and using it as the standard, he is not a very good judge, that he is both antilabor and not a very good judge.

Now, the other thing we did, the only other objective test we could get, was to compare his votes with his fellow judges, and we did that, too. I don't think that going through the cases where he may have affirmed some arbitration award or set it aside, where the court was unanimous, where it may have been per curiam, where there is no reason to think it was a particularly significant matter, I don't think that that has any significance. And that is why we didn't do it.

We did put in three or four of the more important unanimous cases that he sat on.

Senator COOK. Mr. Harris, I can only tell you your interpretation of the significance of a suit tried and decided at the district level and mine certainly are different because there are many, many millions of litigants in this country that never get beyond the State level in the Federal district court system, let alone the district level, and when you say——

Mr. HARRIS. The court of appeals.

Senator COOK (continuing). That cases decided at the district level are insignificant, you really pass me by, lawyer to lawyer.

Mr. HARRIS. I didn't say they were insignificant. I say the cases where the court of appeals, not the district, where the court of appeals was unanimous, that the great run-of-the-mine cases on the sufficiency of the evidence are not a very useful clue to determining the judge's attitude. I say it can be determined much better by comparing him with what the Supreme Court did in the cases it reviewed or by comparing him with his fellow judges where there was a difference of opinion.

Senator COOK. Thank you.

Thank you, Mr. Chairman.

Senator MATHIAS. Mr. Chairman, I would like at this late hour of the afternoon to add a word of personal welcome to Mr. Meany and Mr. Biemiller, distinguished Marylanders. We are glad to have them here, and Mr. Harris, their counsel.

I would like not to prolong this but just to try to get to the heart of what our job is, to raise a question as to whether this boxscore we are talking about really is the heart of the question, whether it is 0 to 10, or 3½ to 1, or whatever, because isn't the question that each member of the committee, and each Member of the Senate, is ultimately going to have to answer, not whether a nominee's

philosophy is in exact agreement with his, but whether Judge Haynsworth is going to properly interpret the law regardless of what his philosophy is?

That raises, of course, the immediate question of his probity and his integrity.

Now, in that regard, Mr. Meany, on page 4 of your statement I think you raise an issue of probity and integrity that Mr. Harris adverted to in his colloquy with the Senator from Kentucky. You say—

> Initially, Judge Haynsworth declined to answer reporters' questions as to whether he had owner shares in Carolina Vend-A-Matic at the time of the *Darlington* decision. When an enterprising reporter later examined and published the records of the Securities and Exchange Commission, the judge acknowledged the facts I have just stated.

At least by implication you are saying he equivocated with the press at that time. Do you think it was a real equivocation in the light of the fact that he must have known that this day was coming in this room and that these matters certainly would come to light at that time?

Mr. MEANY. I don't know, Senator. All I know is what I read in the papers, that he declined to answer the question. The question was whether or not he had owned shares in this Carolina Vend-A-Matic. He declined to answer the question.

Now, as to why he did that I don't know, but it certainly indicates that he was less than frank. Now, a few days later he acknowledged it, after a story appeared in the press about this.

Senator MATHIAS. Do you have the clips on that? That is the sequence that personally I didn't happen to follow.

Mr. MEANY. I can get them. I don't have them here.

Senator MATHIAS. If you can supply them for the record.

Mr. MEANY. Bill Eaton wrote the—he is with the Chicago paper that got this material out of the Securities and Exchange Commission.

Senator MATHIAS. Mr. Chairman, I would like to——

Mr. HARRIS. We can supply the clips.

Senator MATHIAS. I would like to have those clips included.

Mr. HARRIS. I think the reporter who said he wouldn't say whether he owned it was the New York Times and the one who later ascertained it was Mr. Eaton. I think they are both here, but we will be glad to supply the clips.

Senator MATHIAS. Well, I think the implication of that statement is a serious one. I think it ought to be supported by the evidence of the clips.

Mr. MEANY. We will get the material to you.

Senator MATHIAS. Thank you very much, Mr. Chairman.

Mr. BIEMILLER. Mr. Chairman, I think there is a technical defect in the record I would like to make sure isn't there. Mr. Meany early in his testimony asked to have the appendixes included as part of his testimony and I don't believe full provision——

Senator ERVIN. Let the record show that Mr. Meany's entire statement, including exhibits and appendixes, will be made a part of the record.

(The material referred to follows:)

JUDGE HAYNSWORTH'S RECORD IN LABOR CASES

AN APPRAISAL BY THE AFL–CIO

Evaluation of the opinions of a judge unavoidably involves subjective judgments to a substantial extent. Recognizing that, we believe that a reading of all of the decisions in labor cases in which Judge Haynsworth has participated discloses that he is insensitive to the needs and aspirations of workers, and to the plight of unorganized employees working for an anti-union employer in a local environment hostile to unionism. In marked contrast, he is instinctively sympathetic with the problems of employers, including rabidly anti-union ones.

In an effort to obtain some objective measure of Judge Haynsworth's role in labor cases, however, we have done two things.

First, we have examined each of the labor cases in which Judge Haynsworth participated which went to the Supreme Court, in order to compare Judge Haynsworth's views on labor issues with those of the Supreme Court.

Second, we have examined each of the labor cases we were able to find in which Jndge Haynsworth participated where there was a division of opinion on the Fourth Circuit, in order to see how he voted on what may be assumed to be doubtful issues.

Both tests confirm that Judge Haynsworth is indeed exceedingly anti-labor.

I

Judge Haynsworth's record in labor cases that were reviewed by the Supreme Court

During his twelve years on the bench, Judge Haynsworth has sat on seven cases involving labor-management relations that have been reviewed by the Supreme Court. Each of these cases is summarized in Appendix A.

Examination of these cases discloses the following facts:

1. In all seven cases that went to the Supreme Court, Judge Haynsworth took the anti-labor position.

2. In all seven cases Judge Haynsworth was reversed by the Supreme Court.

3. In six of the cases the Haynsworth position was unanimously rejected by all participating Supreme Court justices. Judge Haynsworth's position was supported by only one Supreme Court justice (Justice Whittaker) in one case. Thus Judge Haynsworth's views in labor cases were rejected not only by liberal Supreme Court justices but by such conservative or moderate justices as Harlan, Clark, Stewart, Frankfurter and White.

Measured against the Supreme Court, Judge Haynsworth has been an anti-labor judge.

Appendix B contains summaries of three additional decisions which could be regarded as labor cases in a broad sense, though not involving labor-management relations. In each of these case, too, Judge Haynsworth voted in favor of the employer, and in each of them the Supreme Court reversed.

Thus Judge Haynsworth's over-all record in the Supreme Court in the labor field is 0–10.

II

Judge Haynsworth's Record in Labor Cases on Which His Court Was Divided

Judge Haynsworth has sat on sixteen labor cases in which there was a division of opinion among his fellow judges. It may be assumed that these were close cases. Each of these cases is tabulated in Appendix C.

Examination of these cases disclose that Judge Haynsworth voted in favor of the employer twelve times, in favor of labor three times, and took a middle position once.

Judge Haynsworth also wrote the opinions in a number of labor cases in which the Fourth Circuit judges were unanimous. The more important of these cases are summarized in Appendix D.

APPENDIX A

LABOR-MANAGEMENT CASES IN WHICH JUDGE HAYNSWORTH PARTICIPATED THAT WERE REVIEWED BY THE SUPREME COURT

NLRB v. *Rubber Workers* (*O'Sullivan Rubber Co.*), 269 F.2d 694, 44 LRRM 2465 (1959), reversed 362 U.S. 329, 80 S. Ct. 759. The union won an election 343–2, at the O'Sullivan plant in Winchester, Virginia, and was certified by the NLRB in April, 1956. Negotiations did not result in a contract, and a strike began in May, 1956. Initially 412 employees struck and 8 appeared for work. The company hired 265 new employees, and eventually 72 additional old employees went back to work. In October 1957 a new NLRB election, in which the strikers could not vote, was held, and the union lost 288–5.

The union engaged in peaceful picketing of the plant throughout the strike, both before and after the 1957 NLRB election, and conducted a consumer boycott from November, 1957 on.

At this point, i.e, October 1957, the NLRB, reversing an interpretation which had stood since the early days of Taft-Hartley, promulgated a new doctrine that picketing by a union which no longer represents a majority of the employees violates the Act. *Drivers, etc., Local 639, and Curtis Bros., Inc.*, 119 NLRB 232. The Board applied this *Curtis* doctrine in O'Sullivan, and ruled that both the picketing and the consumer boycott were in violation of the Act. 121 NLRB 1439. 42 LRRM 1567. The Court of Appeals for the Fourth Circuit enforced the Board's order in an opinion by Judge Soper, with Judge Haynsworth concurring and Judge Sobeloff dissenting. *NLRB* v. *Rubber Workers* (*O'Sullivan Rubber Co.*), 269 F. 2d 694, 44 LRRM 2465 (1959). The other courts of appeals which considered the Board's *Curtis* doctrine, i.e., the Ninth and District of Columbia circuits, rejected it, as did the Supreme Court when *Curtis* reached it. *NLRB* v. *Drivers, etc., Local 639*, 362 U.S. 274, 80 S. Ct. 706 (1960). Six justices joined in the opinion of the Court, while three favored remanding the case to the Board for reconsideration under the Landrum-Griffin Act (1959) which had been passed meanwhile.

The Court unanimously reversed *O'Sullivan, per curiam*, on the authority of *Curtis. United Rubber Workers* v. *NLRB*, 362 U.S. 329, 80 S. Ct. 759.

The *Curtis-O'Sullivan* issue has been superseded by Landrum-Griffin, which dealt explicitly with the right of strikers to vote, with consumer boycotts, and with organizational and recognition picketing.

United Steelworkers of America v. *Enterprise Wheel and Car Corp.*, 361 U.S. 593, 80 S. Ct. 1358 (1960) reversing 269 F.2d 327 (1959). The issue was the scope of judicial review of an arbitrator's award. The Supreme Court ruled, 7–1 with Justice Whittaker dissenting, that the Court of Appeals had exceeded the permissible scope of judicial review. The opinion of the Court of Appeals was written by Soper J., with Sobeloff and Haynsworth concurring.

NLRB v. *Washington Aluminum Company*, 291 F.2d 869, 48 LRRM 2558 (1961), reversed 370 U.S. 9, 82 S. Ct. 1099 (1962). Seven machine shop workers in an unorganized plant walked out in protest against the extreme cold in the shop, after being needled by their foremen to the effect that if they had any guts at all they would go home. The employer fired them.

The NLRB held that the men had been engaged in "concerted activities for * * * mutual aid or protection" (§ 7 of the Act), and ordered them reinstated with back pay.

The Fourth Circuit, in an opinion by Judge Boreman concurred in by Judge Haynsworth, with Judge Sobeloff dissenting, held that the men were discharged "for cause," and set aside the Board's order. The Supreme Court reversed, unanimously.

DARLINGTON

In 1956 Textile Workers Union of America, AFL–CIO, won an NLRB election at a textile mill operated by Darlington Mfg. Co. The company closed the mill, promptly and permanently, and laid off its 500 employees.

The Board and courts ultimately held, after involved proceedings which are still going on 13 years later, that Darlington and numerous other mills were controlled by Deering Milliken & Co., so that they were to be regarded as a single employer; that Darlington was closed because of the anti-union animus of Roger Milliken; that one purpose of the closing was to "chill unionism" in other Deering Milliken plants; and that the closing was in violation of the NLRA.

The *Darlington* case has been before the Court of Appeals three times, and Judge Haynsworth participated each time.

Darlington I presented a preliminary procedure issue. Judge Haynsworth wrote the opinion for a unanimous court, Sobeloff and Boreman being the other members. *Deering Milliken* v. *Johnson*, 295 F.2d 856, 48 LRRM 3162 (1961).

The opinion is notable for Judge Haynsworth's criticism of NLRB delays. While there was much justification for this criticism of the Board, the judge failed to note that the companies, who were complaining of Board delays, had contributed mightily to them, or that the discharged employees, not the companies, were the principal sufferers from Board delay.

Judge Haynsworth's stringent criticism of NLRB delays contrasts with his indulgence toward the Prince Edward County School Board in the famous school closing case. There the Court of Appeals ruled, in a 2–1 opinion by Judge Haynsworth, that the district court should not, even after years of litigation, have ruled on the School Board's latest sheuanigans without giving the Supreme Court of Appeals of Virginia an opportunity to rule first. *Griffin* v. *Board of Supervisors*, 322 F.2d 332 (1963). The Supreme Court disagreed, declaring, "There has been entirely too much deliberation and not enough speed." *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 229, 84 S. Ct. 1226, 1232. Because of these delays the Supreme Court took the unusual step of taking the case away from the Court of Appeals, without permitting it to rule on the merits. *Griffin* v. *County School Board*, 375 U.S. 391, 84 S. Ct. 400.

Darlington II. The case was first argued on the merits before the Court of Appeals in 1963. (*Darlington Mfg. Co.* v. *NLRB*, 325 F.2d 682, 54 LRRM 2499.) The Court of Appeals held, 3–2, that "a company has the absolute right to close out a part or all of its business regardless of antiunion motives." (This language is the Supreme Court's summary of the holding of the Court of Appeals. See 380 U.S. 263, 268). Judge Haynsworth joined in the majority opinion, which was written by Judge Bryan.

Judge Bell, in a dissenting opinion concurred in by Judge Sobeloff, observed:

"The Darlington Mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be aud was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization." (325 F. 2d 682, 691, 54 LRRM 2499, 2507.)

The Supreme Court reversed, unanimously. *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 85 S. Ct. 994 (1965). (The case was argued in the Supreme Court for the companies by Senator Ervin of North Carolina.) The Court held that it is not a violation of the NLRA "when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union" (380 U.S. at 273, 274, 85 S. Ct. at 1001), but that a partial closing is an unfair labor practice (380 U.S. at 275, 85 S. Ct. 1002):

"If motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."

The Court remanded the case to the Board for further findings on "purpose" and "effect."

Darlington III.—On remand, the Board found that the purpose and effect of the Darlington closing was to chill unionism in the other Deering Milliken mills. It ordered Darlington and Deering Milliken to pay back wages, less interim earnings, until the employees obtained substantially equivalent employment or were put on a preferential hiring list for other mills of Deering Milliken.

The Court of Appeals enforced the Board's order. *Darlington Mfg.* v. *NLRB*, 397 F. 2d 760, 68 LRRM 2356. Four judges joined in the opinion of the court by Judge Butzner, which held that the evidence supported the Board's findings that Deering Milliken and Darlington were a single employer, and that the purpose and the effect of shutting the Darlington mill were to chill unionism in other Deering Milliken mills. The court held that the remedy ordered by the Board was appropriate.

In its order, the Board had held in abeyance, for future enforcement proceedings, the question whether the companies could cut off or reduce back pay liability by showing that the mill would have closed as of a particular date even if the employees had not voted for the union. In its opinion the court of appeals noted, but expressed no opinion on, this unresolved issue. (68 LRRM at 2365). In a special concurring opinion, however, Jndge Haynsworth put in a word in advance for the company on this issue, *viz.* (68 LRRM at 2367):

As the principal opinion notices, the duration of any back pay period has been left for determination in compliance proceedings, and there is no occasion for us to address ourselves to that matter, except that I would note that one cannot reconcile the emphatic evidence of the conduct of the independent directors and stockholders with any notion that Darlington had more than a very brief expectancy."

The Authorization Card Cases.—Probably the most significant labor issue on which Judge Haynsworth has played major role is whether the Board may, in certain circumstances, order an employer to recognize and bargain with a union on the basis of signed union authorization cards, or whether an employer may never be required to recognize a union without an election, even if the employer has committed unfair labor practices which make a fair election impossible or improbable.

The leading decision in the Fourth Circuit was *NLRB* v. *S. S. Logan Packing Co.*, 386 F. 2d 562, 66 LRRM 2596 (1967). The opinion was written by Judge Haynsworth, and concurred in by Judge Boreman. The court ruled that authorization cards are inherently "not a reliable indication of the employees' wishes" (66 LRRM at 2599); that the fact that an employer commits unfair labor practices does not negate good faith doubt of the union's majority status; and that whenever there is such a doubt the Board may properly resolve it only by an election. Judge Haynsworth concluded by stating that "In those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive * * * that a fair and reliable election cannot be had, the Board may have the power to impose a bargaining order. * * * [However] The remedy * * * if ever appropriate must be reserved for extraordinary cases." (66 LRRM at 2603). Subsequent decisions made it clear that in Judge Haynsworth's view no case was that "extraordinary." For all practical purposes Judge Friendly, of the Second Circuit, was correct in stating that in the Fourth Circuit "an employer is not required unde any circumstances to recognize a union on the basis of a card majority." *NLRB* v. *United Mineral Corp.*, 391 F. 2d 829, 836, note 10, 67 LRRM 2343, 2347 (1968).

Judge Sobeloff dissented from the doctrine propounded by Judge Haynsworth in Logan. See *Crawford Mfg. Co.* v. *NLRB* (dissenting opinion), 386 F. 2d 367, 66 LRRM 2529 (1967), *certiorari denied*, 390 U.S. 1028, 88 S. Ct. 1408 (1968); *NLRB* v. *Schon Stevenson & Co.* (concurring opinion), 386 F. 2d 551, 66 LRRM 2603 (1967).

However the Fourth Circuit ultimately adopted the course of disposing of these cases *per curiam* on the authority of *Logan*. See *NLRB* v. *Gissel Packing Co.*, 398 F. 2d 336, 68 LRRM 2637 (1968); *NLRB* v. *Heck's, Inc.*, 398 F. 2d 337, 68 LRRM 2638 (1968); *General Steel Products, Inc.* v. *NLRB*, 398 F. 2d 339, 68 LRRM 2638 (1968). In all these cases the court was comprised of Haynsworth, Boreman and Winter; and in all of them the court sustained the Board's findings of discriminatory discharges and intimidation, but refused to enforce its order that the employer recognize and bargain with the union.

The view articulated by Judge Haynsworth in *Logan* and applied in *Gissel, Heck's and General Steel* was rejected by the First, Second, Fifth and Sixth Circuits prior to the granting of *certiorari* in *Gissel* and the other two cases, and was finally unanimously rejected by the Supreme Court in *NLRB* v. *Gissel Packing Co.*, 89 S. Ct. 1918 (1969). Its fundamental flaw, which should be obvious to almost anyone who is not blinded by strong anti-union views, was stated by the Court in the following terms (89 S. Ct. at 1838):

"Remaining before us is the propriety of a bargaining order as a remedy for a § 8(a)(5) refusal to bargain where an employer has committed independent unfair labor practices which have made the holding of fair elections unlikely or which have in fact undermined a union's majority and caused an election to be set aside. We have long held that the Board is not limited to a cease-and-desist order in such cases, but has the authority to issue a bargaining order without first requiring the union to show that it has been able to maintain its majority status. . . . We see no reason now to withdraw this authority from the Board. If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' . . . while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election

processes and put off indefinitely his obligation to bargain: and any election held under these circumstances would not be likely to demonstrate the employees true, undistorted desires."

APPENDIX B

OTHER HAYNSWORTH LABOR CASES REVERSED BY THE SUPREME COURT

Walker v. *Southern Railroad Company* 354 F. 2d 950, 61 LRRM 2102 (1965) (Bryan, Haynsworth and Michie) reversed *per curiam* 385 U.S. 196 (1966) (Harlan, Stewart and White dissenting). In *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941), the Supreme Court had held that an immediate suit, instead of initial resort to the National Railroad Adjustment Board, by a discharged employee against his railroad for breach of the collective agreement was permissible, when the employee asked for money damages only and not reinstatement. In *Walker*, the Fourth Circuit held that this rule was no longer the law in light of *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965) which held that a non-railroad employee could not bring suit for breach of contract without first exhausting the grievance and arbitration remedies provided for in the agreement. On this basis, a District Court judgment in favor of Walker was reversed.

In its *per curiam* opinion, the Supreme Court noted that its opinion in *Maddox* "expressly stated that we do not mean to overrule [Moore] within the field of the Railway Labor Act" and that as opposed to the *Maddox* situation "provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act . . . [Moreover] both at the time of petitioner's alleged discharge and at the time he brought his lawsuit there was considerable dissatisfaction with the operations of the National Railroad Adjnstment Board . . . [because] railroad employees who have grievances sometimes have to wait as long as ten years or more before a decision is rendered" and because of the fact that only the employer could appeal from an adverse decision. The Court, therefore, concluded that "the contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuades us that we shonld not overrule [Moore] in his case."

Mitchell v. *Lublin, McGaughy and Associates*, 259 F.2d 273 (1957) (Soper, Haynsworth and Parker) *reversed* 358 U.S. 207 (1959) (Chief Justice Warren for seven members of the Court with Whittaker and Stewart dissenting). The Fourth Circuit decided that draftsmen, fieldmen, clerks and stenographers employed by the defendant, which was engaged in the business of designing public industrial and residential projects for the Government and for private customers in a number of states, were not covered by the Fair Labor Standards Act. In his opinion reversing that judgment, Chief Justice Warren stated:

"The test is 'whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.'"

Applying this test, he held that the employments in question were covered by the FLSA.

United States v. *Seaboard Airline Railroad*, 258 F.2d 262 (1958) (Haynsworth and Williams; Sobeloff concurring and dissenting) *reversed* 361 U.S. 78 (1959) (Douglas, J., for a unaimous Court). The Safety Appliance Act requires that the brakes of cars must be coupled and operable in "train movements" but does not impose the same requirement as to "switching movements." The Fourth Circuit rejected the Government's contention that movements within a switching yard over a distance of about two miles without picking up or delivering any car en route were "train movements." The Supreme Court reversed.

APPENDIX

LABOR CASES IN WHICH JUDGE HAYNSWORTH PARTICIPATED WHERE THERE WAS A DIVISION OF OPINION AMONG THE JUDGES

In the tabulation which follows the name of the judge writing the opinion appears first. An element of personal judgment is necessarily involved in classifying decisions as favorable or unfavorable to employers or labor, since often numerous issues are decided in one case.

(1) *NLRB* v. *Rubber Workers* (O'Sullivan Rubber Co.), 269 F.2d 694, 44 LRRM 2465 (1959), *reversed* 362 U.S. 329, 80 S. Ct. 759 (1960). Soper and Haynsworth; Sobeloff dissenting. The decision, in favor of the employer and the NLRB and adverse to the union, is summarized in Appendix A.

(2) *Textile Workers* v. *American Thread Co.*, 48 LRRM 2534 (1961). Boreman and Haynsworth; Sobeloff dissenting. Decision in favor of employer and against union, refusing enforcement of arbitration award directing reinstatement of a discharged employee. The first sentence of Judge Sobeloff's dissenting opinion states:

"The court's decision in the present case not only fails to heed the unequivocal teaching of the Supreme Court in three recent labor arbitration cases, but it also directly conflicts with previous decisions of this court and other federal courts." (Footnotes omitted).

(3) *NLRB* v. *Washington Aluminum Company*, 291 F. 2d 869, 48 LRRM 2558 (1961), *reversed* 370 U.S. 9, 82 S. Ct. 1099 (1962). Boreman and Haynsworth; Sobeloff dissenting. The decision, in favor of the employer, and adverse to the NLRB and the workers, is summarized on p. 6.

(4) *NLRB* v. *Quaker City Life Insurance Co.*, 319 F. 2d 690, 53 LRRM 2519 (1963). Bell and Haynsworth; Boreman dissenting. Decision in favor of NLRB and union, and against employer, upholding single-office bargaining unit in insurance industry.

(5) *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682, 54 LRRM 2499, *reversed* 380 U.S. 263, 85 S. Ct. 994 (1965). Bryan, Haynsworth and Boreman; Bell and Sobeloff dissenting. This case, Darlington II, is discussed in Appendix A.

(6) *Wellington Mill Division, West Point Mfg. Co.* v. *NLRB*, 330 F. 2d 579, 55 LRRM 2914 (1964), *certiorari denied*, 379 U.S. 882. Boreman and Haynsworth; Bell dissenting. Decision substantially in favor of employer and against NLRB and union on sufficiency of evidence re discriminatory discharges, intimidation, etc.

(7) *NLRB* v. *Wix Corp.*, 336 F. 2d 824, 57 LRRM 2079 (1964). Bryan and Haynsworth; Bell dissenting. Decision substantially in favor of employer and against NLRB and union on sufficiency of evidence re discriminatory discharges, intimidation etc. The dissenting opinion of Judge Bell reads, in its entirety:

"J. Spencer Bell, Circuit Judge, dissenting:—I disagree with my breathren. I think there is evidence to support all of the Board's findings. I do not think we should take what pleases us and reject what does not."

The (unanimous opinion in an earlier related case was written by Judge Haynsworth. 309 F. 2d 826, 51 LRRM 2434 (1962).

(8) *NLRB* v. *M & B Headwear Co.*, 349 F. 2d 170, 59 LRRM 2829 (1964). Sobeloff and Haynsworth; Bryan dissenting. Decision substantially in favor of NLRB and union, and against employer, on sufficiency of evidence re discriminatory discharges, intimidation, etc.

(9) *Taylor* v. *Local 7, Horseshoers*, 353 F. 2d 593, 60 LRRM 2440 (1965), *certiorari denied*, 384 U.S. 969, 86 S. Ct. 1859 (1966). Boreman, Haynsworth and Bryan; Sobeloff and Bell dissenting. Decision in favor of employers and against union on application of anti-trust laws and Norris-LaGuardia Act to dispute between owners and trainers of racehorses and horseshoers.

(10) *NLRB* v. *Lyman Printing & Finishing Co.*, 356 F. 2d 884, 61 LRRM 2440 (1966). Bryan and Haynsworth; Bell dissenting. Decision in favor of employer and against NLRB and union on sufficiency of evidence re discriminatory discharges, intimidation, etc. Judge Bell, dissenting, observed "We should not usurp the Board's function of determining credibility."

(11) *Westinghouse Electric Corp.* v. *NLRB*, 387 F. 2d 542, 66 LRRM 2634 (1966). Boreman, Haynsworth, Bryan and Winter; Sobeloff and Craven dissenting. Decision in favor of employer and against NLRB and union, that increases in food and coffee prices by an independent concessionaire in a plant are not a subject for mandatory bargaining with the union. National Automatic Merchaudising Association filed a brief *amicus curiae* in support of the employer.

(12) *Schneider Mills, Inc.* v. *NLRB*, 390 F. 2d 375, 67 LRRM 2413 (1968). Winter, Haynsworth, Boreman, Bryan and Butzner; Sobeloff and Craven dissenting. Decision in favor of employer and against NLRB and union that NLRB election was invalidated by union misrepresentations.

(13) *Darlington Mfg. Co.* v. *NLRB*, 397 F. 2d 760, 68 LRRM 2356 (1968). Butzner, Sobeloff, Winter and Craven; Haynsworth concurring specially; Bryan and Boreman disseuting. This case, *Darlington III*, is discussed in Appendix A. It is difficult to characterize Judge Haynsworth's opinion as either for the employer or the union.

(14) *Lewis* v. *Lowry*, 295 F. 2d 197 (1961). Haynsworth and Soper; Sobeloff dissenting. The District Court entered summary judgment for the trustees of the Mine Workers Welfare Fund for "royalty" payments at the rate of 40c per ton of coal mined by the defendant company. The defense interposed on appeal was that parol evidence, to sbow that the collective agreement which provided for the royalties was purely pretensive and was entered into with no intention that it was to be binding upon either party, was erroneously excluded. The Court of Appeals held this defense good in law, and remanded. On remand, Lowry prevailed and the trustees appealed. In a unanimous *en banc* decision. Judge Bryan held that the defendant's evideuce "falls far short." Judge Sobeloff concurred specially. *Lewis* v. *Lowry*, 322 F. 2d 453 (1963).

(15) *Radiator Specialty Company* v. *NLRB*, 336 F.2d 495 (1964) Bryan and Haynsworth; Sobeloff concurring and dissenting. The NLRB found that the company restrained and coerced its employees, failed to bargain in good faith, and refused to reinstate 141 strikers upon their unconditional offer to return to work after an unfair labor practice strike to protest the illegal refusal to bargain. The Fourth Circuit euforced the findings of restraint and coercion unanimously, but refused to enforce the remainder of the Board's order, with Judge Sobeloff dissenting.

(16) *Dubin-Haskell Lining Corp.* v. *NLRB*, 386 F.2d 306 (1967) (Winter, Sobeloff, Craven, Butzner and Haynsworth; Boreman and Bryan dissenting) (*reversing* 375 F.2d 568 (1962) (Boreman, Bryan and Jones). The panel decision refused enforcement to a Board decision that the company had refused to rehire an employee because that employee had filed unfair labor practice charges with the Board. The *en banc* decision rejected the panel's views and upheld the Board. The case turned entirely on substantial evidence questions.

Appendix D

Important Unanimous Decisions in Labor Cases Written by Judge Haynsworth

Glendale Manufacturing Company v. *Local 520 ILGWU*, 283 F.2d 936 (1960) (Haynsworth, Boreman and Paul). The applicable collective agreement contained a clause permitting an annual reopening of wages in the event of a change of at least 5% in the Consumers' Price Index. The contract further provided that if wages were reopened and parties could not agree, that the amount of the increase would be subject to arbitration. During the last year of the agreement the Union sought to reopen wages and the Company refused to meet. The Union filed for arbitration and the arbitrator held that the company was required to meet but refused to set the amount of the increase on the ground that he was empowered to do so only after negotiations had failed. The award was handed down six days prior to the expiration of the contract and the union lost an NLRB election one week thereafter. The company refused to honor the award and the union brought suit. Judge Haynsworth held in favor of the company:

"We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any snch basis, they would invade the statutory right of the employees . . .

"Under the circumstances, it seems appropriate to refer the entire matter back to the arbitrator who may reframe the award in the light of subsequent developments. Unless the substantive right of negotiation has been foreclosed by other events, he may order the employer to negotiate the wage question with the employees directly or with any properly constituted committee or representative of the employees."

The question presented in *Glendale* is a close and difficult one. It is instructive, however, to compare Judge Haynsworth's approach to the problem to that of Judge Brown when faced with the same question in *United States Gypsum Company* v. *Steelworkers*, 384 F. 2d 38 (Fifth Circuit, 1967):

"It may be borne in mind that what we are talking about relates only to the right of the Union to act as the champion for the employees to assert their substantive rights under the contract. The duration in time of the substantive rights themselves is not affected by decertification. Decertification cannot ordinarily extinguish substantive rights. But it might have a powerful effect on whether the union can champion those rights. This problem essentially comes down to the judge-made balancing of competing factors.

* * * * * * *

"It is one thing for an employee or a group of employees to have rights giving rise to benefits which are immediately due. It may be quite another thing to make them effectual. Here the disparity in economic strength and resources is sharply revealed. Here the worker needs an advocate able to match these opposing strengths. To leave the individual worker to his own devices and resources in the name of legislation designed to equalize positions is to ignore the rich history of labor-management relations and to frustrate a primary aim of such legislation.

"Whether . . . differences arise in the formative process of bargaining leading up to the contract, or that continuous bargaining duty in the performance of such contract, the employees need a champion having an ardent interest and ample resources. Since the union has presumably obtained the disputed 'right' in the first instance by getting it in the contract, there does not seem to be any reason why it should not be the champion of that right when the controversy comes alive, certainly not where there is then no competing union claiming to be the contemporary bargaining representative."

Sheppard v. *Cornelius*, 302 F. 2d 89 (1962) (Haynsworth, Sobeloff and Bryan). The plaintiffs asserted a claim to additional wages which they claimed were due and owing under the National Bituminous Coal Agreement of 1950. Judge Haynsworth, citing *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, held:

"Individual rights, individually asserted, though stemming from a collective employment agreement and solely dependent upon it, cannot be enforced under § 301 of the Labor Management Relations Act. If there is substance in the rights asserted by these employees, the rights may be enforced through traditional actions brought in the state courts. There is no federal jurisdiction to enforce them."

Eight months later in *Smith* v. *Evening News Association*, 371 U.S. 195 (1962), Mr. Justice White writing for eight members of the Court, reached a position directly opposite to that taken by the Fourth Circuit in *Sheppard:*

"The concept that all suits to vindicate individual employee rights arising from a collective bargaining contract should be excluded from the coverage of § 301 has thus not survived [decision of the Court prior to *Sheppard*]. The rights of individual employees concerning rates of pay and conditions of employment are a major focus of the negotiation and administration of collective bargaining contracts.

". . . To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

"The same considerations foreclose respondent's reading of § 301 to exclude all suits brought by employees instead of union.

". . . Neither the language and structure of § 301 nor its legislative history requires or persuasively supports this restrictive interpretation, which would frustrate rather than serve the congressional policy expressed in that section."

United Steelworkers of America v. *Bagwell*, 383 F. 2d 492 (1967) (Haynsworth, Bryau and Bell). Statesville, North Carolina, passed an ordinance making it unlawful to distribute handbills or circulars soliciting memberships, for which there was a charge, in an association, and by requiring those who sought to distribute such handbills and circulars to obtain a license. After being informed that the ordinances were in force and that violators would be prosecuted, the Steelworkers brought suit in Federal Court to enjoin enforcement of these ordinances. The District Court refused the injunction and on appeal the Fourth Circuit reversed. The Court of Appeals held that under *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) there was no grouud upon which a Federal Court could properly abstain since it was plan that the ordinances were applicable

to the plaintiffs and were not susceptible to an interpretation that would avoid the necessity of deciding the constitutional questions presented. On the merits, Judge Haynsworth, relying on an unbroken line of Supreme Court authority including *Schneider* v. *State*, 308 U.S. 147 (1939); *Kunze* v. *New York*, 340 U.S. 290 (1951); *Hill* v. *Florida*, 325 U.S. 538 (1945) and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964), found that "the ordinances are patently unconstitutional."

The decision in *Bagwell* is plainly correct and the only matter worthy of additional comment is the fact that the opinion did not issue for 20 months after the argument was heard.

Mr. MEANY. Thank you.

Senator ERVIN. I want to ask a question that one of you gentlemen put, and that was what Senator Cook's questions indicate.

It appears here clearly from this Patricia Eames' letter of December 17, 1963, that she was an attorney for the Textile Workers Union of America, AFL–CIO. It appears that she had information at that time that Judge Haynsworth was the vice president of the Carolina Vend-A-Matic, and the case had just been handed down adverse to the union.

If he had a conflict of interest which should have disabled him to sit, the party to the case, the Textile Workers Union of America, knew of that conflict of interest. They could have gone back into the court and moved to set aside the verdict on that ground, if they believed a real conflict of interest existed or they could raise the same point on appeal to the Supreme Court.

They did neither, which would indicate at that time they didn't think there was a conflict of interest by way of his association with Carolina Vend-A-Matic.

Mr. MEANY. Can I read to you a portion of the union's statement on that?

The union did not pursue the question whether Judge Haynsworth should have disqualified himself. In dropping this matter it was influenced by the following considerations: (*a*) The union had relayed to the court a much more serious charge which had been proven false. It was evident that the judges were not pleased with the union and the union would inevitably be a litigant before those judges for years to come.

(*b*) The United States Code leaves it to the judge to determine whether in his opinion it is improper for him to sit. It is as the court put it a matter confided to the conscience of the particular judge.

(*c*) The union did not and does not now have all the facts. We did not and do not know whether Judge Haynsworth had a large interest in Carolina Vend-A-Matic, a small interest, or no interest. We did not and do not know whether he was a salaried officer or whether his role was purely nominal."

All they knew was he was a first vice president.

Senator ERVIN. They knew as a first vice president that he had an interest in Vend-A-Matic, and I would say that I think the union has very competent lawyers and that any lawyer who believed or any litigant who believed there was a conflict of interest would have raised the question at that point unless conflict of interest is entirely an afterthought promoted by the fact that he was designated to be on the Supreme Court.

Mr. MEANY. Don't you think the lawyer for the union was a little bit embarrassed by the fact he raised a question that was immediately proven false and that he felt the best thing to do is to carry the matter to the Supreme Court?

Senator ERVIN. Yes, and I would raise it to the Supreme Court if I was embarrassed to raise it before the circuit court.

Senator HART. Mr. Chairman, with respect to the schedule tomorrow, are we in a position to advise witnesses, some of whom have been here all day, what to anticipate? Members, too.

Senator ERVIN. All I know is that Senator Eastland told me this morning he is going to sit tomorrow.

Senator HART. Who should be here?

Senator ERVIN. On the basis of that statement I will recess the committee until 10:30 tomorrow.

(Thereupon, at 5:55 p.m. the committee recessed, to reconvene tomorrow, Friday, September 19, 1969, at 10:30 a.m.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

FRIDAY, SEPTEMBER 19, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:45 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr. presiding.

Present: Senators Eastland (chairman), McClellan, Ervin (presiding), Bayh, Cook, Mathias, and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

Senator ERVIN. The committee will come to order.

Before examining the next witness, I would like to put the *Logan* case into the record so every Senator can evaluate whether it manifests an antiunion bias on the part of Judge Haynsworth. This case was entitled *National Labor Relations Board* v. *S. S. Logan Packing Co.* and it is reported in 380 Federal Reporter, 2d series, beginning at page 562.

This is the only opinion written by Judge Haynsworth which was cited by Mr. Harris, to sustain his charge that Judge Haynsworth is antilabor.

As I interpret this opinion, it merely recognizes a very fundamental truth that the best way to let the employees determine whether they want to be represented by a union is to allow them to have a secret ballot on that fact, and the laws of virtually every State in the Union agree that voters should have a secret ballot so they could choose their representatives and their public officials. I, for one, say that is by far the most preferable way to allow a person to express his will. That is, to allow a worker to vote freely in a booth, in an election supervised by a governmental agency like the National Labor Relations Board, and allow him to express his opinion in a booth where nobody is there except his own conscience.

In order that each Senator may have a record that will allow each Senator to interpret this opinion himself I order that this opinion be inserted in the record at this point.

(The opinion appears in the appendix.)

Senator ERVIN. Also since there is some question here about the *Gissel* case, which is another one which has been mentioned, I would like to insert in the record at this point a copy of that per curiam opinion.

(The opinion appears in the appendix.)

Senator ERVIN. I would also ask the staff that they place in the record a copy of the Supreme Court decision in the *National Labor Relations Board* against the *Gissel Packing Co.* This decision was handed down on June 16, 1969. Now, in this case three of the decisions of the Fourth Circuit Court were reversed, two of them on the grounds that the Supreme Court recognized a new rule for determining when cards could be counted. The court said in those two cases that both the National Labor Relations Board and the court of appeals were in error in that they entered final judgments without the National Labor Relations Board having found the requisite facts.

So everybody was wrong there, but still the Supreme Court said there is very little ground of disagreement between them and the Fourth Circuit Court on this question. So I would like to have this put in the record.

(The opinion appears in the appendix.)

Senator ERVIN. I am sorry that Mr. Harris is gone because I want to make this observation, I deduced from his testimony that the——

Mr. HARRIS. I am here, Senator, if you want to resume our colloquy.

Senator ERVIN. No, I just want to say this and I will give you a chance to reply to it. I deduce from your testimony that you think that Judge Haynsworth is antiunion because he decided against unions, some cases which they thought they were entitled to win, and you enumerated 10. You left out of consideration 37 in which he decided in favor of the unions.

So I infer from your testimony that you think Judge Haynsworth is antiunion because he decided 10 out of 47 cases against the union or participated in decisions to that effect, and you thought that the union was entitled to win in all the cases.

I always admired that quality in an advocate. I always thought that my clients ought to win all of their cases, too, but I lost many of them.

So the basis for the antiunion charge, as I see it, against Judge Haynsworth is that he decided or participated in 10 cases out of, I believe, 47, in which the union lost.

So it looks to me that a man is to be considered antiunion unless he decides 100 percent of the cases in favor of the union regardless of what the evidence and the facts show, in his opinion. That is all I have to say.

Mr. HARRIS. Senator, you totally misstate the basis of our objection to Judge Haynsworth, but I answered your comments at adequate length yesterday and I don't really feel any need to repeat them. I am sure the record yesterday will adequately state our position on it.

Senator ERVIN. Thank you.

I have just one more observation on your testimony and that is you charge Judge Haynsworth with the responsibility for the conditions that prevailed in Prince Edward County. I think it is just as fair to charge him with the responsibility for those conditions as it is to charge Mr. Meany for the responsibility for what is happening in construction trades in unions in Pittsburgh, but I don't hold him responsible for that because I don't think he can control them.

Mr. HARRIS. Well, Senator, I am sure that the NAACP will answer that in detail, in the event, which appears unlikely, that the committee ever permits them to testify.

Senator ERVIN. Well, the committee will permit them to testify if they want to.

The next witness is Mr. Culbertson.

Mr. Culbertson, will you identify yourself for the record.

STATEMENT OF JOHN BOLT CULBERTSON, PRESIDENT, GREENVILLE COUNTY BAR ASSOCIATION, GREENVILLE, S.C.

Mr. CULBERTSON. Thank you, Senator Ervin.

My name is John Bolt Culbertson. The Bolt is from my mother's side.

I am a practicing attorney confining my practice to representing poor people, laboring class of people, the indigent. I have never represented any corporation.

I have been active in the field of civil rights.

My home is in Greenville, S.C., but I was born at Laurens, S.C., 61 years ago on the 16th of September this year.

The CHAIRMAN. Tell us what organizations you belong to. Do you belong to the ADA?

Mr. CULBERTSON. Yes, sir, I have been a long-time member of the Americans for Democratic Action. We recently formed a chapter in Greenville, S.C. I am a member of that organization.

I am a member of the American Bar Association, and I am a committee member appointed by our State president of the South Carolina Bar Association of the Committee on Legal Services to the Indigent.

I am presently the county chairman. I mean the president of the Greenville County Bar Association which has approximately 300 members, in that neighborhood. All practicing lawyers in South Carolina are in an integrated bar. We must belong, we must pay our dues, so I am a union lawyer in the true sense of the word.

I am not regularly retained by any specific union. I want to correct one impression that might have been made here by Senator Hollings when he stated that I was the Textile Workers attorney in South Carolina. I am really not the Textile Workers Union attorney. They don't have an attorney as such in South Carolina that I know anything about.

I think perhaps the basis of that statement was that I have over the years done a great deal of work for the Textile Workers Union.

At the present time, someone might challenge that, so I thought—my wife got concerned about that when it was announced and she turned to me and said, "Is that so? Can you substantiate that?" I said, "Well, I didn't say that." But I will say this much, that if I am not representing the Textile Workers Union in South Carolina right now, they are in a pretty a bad way because they were sued not long ago at Rock Hill, S.C., for $1,050,000, and I put in an answer for them, and if I don't represent them they are in default right now, because I am the only attorney of record for them.

I am not worried about losing the case, although the suit was brought by Mr. John Marion who is a brother of the two partners, the Marion Bros., in the Haynsworth firm. So I know I am up against a competent attorney, and they don't sue us lightly for $1,050,000, but I can assure Mr. Pollock and Miss Eames and the others who are concerned about it that they don't have too much to worry about.

I am not saying that boastfully because if we eventually go to the Supreme Court I think Judge Haynsworth will pass on it and I would be glad for him to do that.

Now——

Senator ERVIN. I would infer, Mr. Culbertson, that you are an attorney in general practice?

Mr. CULBERTSON. Yes, sir.

Senator ERVIN. But you had a great deal of experience in appearing in cases that involve labor-management controversies?

Mr. CULBERTSON. Yes.

Senator ERVIN. And that on many occasions you have represented in lawsuits and are now representing in one pending lawsuit the Textile Workers Union of America?

Mr. CULBERTSON. Yes, sir.

Senator Ervin, I would like to also state by way of identification, because I haven't written any books, and I have got nothing to show that I am a lecturer or anything like that, but I think I have written a pretty good record in South Carolina in the field of civil rights and labor law, and recently, about a year and a half or 2 years ago, something like that, there was a boy named Hood that was fired from J. P. Stevens at Slater, S.C., for union activity. They were there, the workers, trying to organize the workers in that particular branch and they were doing a pretty good job. They fired this boy and they had the international representative of the union there, and apparently thought it, somebody thought it was a good idea to get access to some secret books that the company had that would help the union in the campaign.

So apparently this boy was seen at night in the store, in the company office, and a fellow employee who also belonged to the union reported it to management. Apparently the book was taken out over the fence at night and taken by the union organizer to North Carolina and photographed and brought back and put back where they got it.

So Hood was charged under the criminal law with housebreaking and grand larceny, and it became my responsibility, and I was hired by the Textile Workers Union to defend that boy. That is not an easy job but thank the good Lord that the jury saw it my way and turned him loose.

Senator ERVIN. I would say on the facts that you were entitled to win, too, because there was no intent to commit a felony or permanently to deprive anybody of their property.

Mr. CULBERTSON. Well, I had some pretty good arguments to the jury.

Senator ERVIN. But you had a hard case to win even though the law was really on your side.

Mr. CULBERTSON. Then, the union was sued at Rock Hill, four suits for $50,000 apiece, and I figured I could win the first three cases but I figured by the time that those cases were over with I would have educated the lawyer so well that he could correct it and beat me on the last case so I effected a settlement of $7,000 for the union, and saved trying the case and we got out of it. Our people had been charged with a little dynamiting of a ball park or something like that, during a strike, but they had another strike over there and they couldn't get

local counsel, so they came to Greenville and got me because, of course, they had some misgivings because I was so identified in the eyes of the public as an NAACP sympathizer that a lot of the members said they didn't want me but they said, "Is he for us? We don't care what he is about them, but is he for us?"

The CHAIRMAN. Let me ask you this question.

Mr. CULBERTSON. Yes.

The CHAIRMAN. Are you in fact a NAACP sympathizer?

Mr. CULBERTSON. In fact what?

The CHAIRMAN. In fact an NAACP sympathizer?

Mr. CULBERTSON. Yes, sir; I am. I sympathize with what they have done and I have helped them do it. And I intend——

The CHAIRMAN. Now, proceed with your testimony.

Mr. CULBERTSON (continuing). And I intend to continue to help them do it, if they need me. I have never been paid—I have been in your State, Senator, I have gone down at Laurel, at Clarksdale, I know I was scared to death down there, but I went there.

[Laughter.]

Mr. CULBERTSON. I went to Laurel, Clarksdale is the place that I went, and I have been to Jackson twice, and the day that I spoke on Sunday the next day Monday they turned the dogs loose on them—I was glad I was gone.

But not only that but, if I may, to go back to the union identification, they had a strike and they couldn't get a lawyer, and I go over there and I represent them and I stayed there and the security guard—the magistrate was sick, so he wrote out, Senator, blanket warrants, arrest warrants, and signed them and turned them over to the private police at the Rock Hill Printing & Finishing Co. and all he had to do was to fill it in and go ahead and arrest anybody he wanted to.

I brought it to the attention of Mr. Kennedy, Mr. Robert Kennedy, on the McClellan committee and tried to get him to look into that but I couldn't get it done. But anyway I represented them.

We cleared every man. We got the injunction dissolved, and I stayed and lived with that situation, and during that strike the newspapers published a letter that they said had been written to the McClellan committee, and it inferred that two of our union members had taken money that people had contributed and bought two new automobiles. The men had bought the automibiles, and that was hurting the union, so I sued the Rock Hill Evening Herald for libel, and they had the most distinguished firm in that area, the Wyche firm, his brother was a Federal judge, you know him, I guess. They came over there and tried that case, to defend it, and before it was over with they paid us for the libel and they let me write the retraction on the front page of the Rock Hill Evening Herald.

Now, in addition to that I have represented the Textile Workers Union any time and every time that they wanted me to do it. I started representing them when they were the Textile Workers Organizing Committee and they tried to get a lawyer in Greenville, when the organizers were picked up by the police, to represent them and this attorney told them he would charge them $5,000 to represent them in the magistrate's court. I took that case for $35, and we cleared them and that was my first case, and from then on I was tainted as a CIO lawyer, which to me is an honor.

I have never deviated from my conviction that we need unions. We have less than 7 percent of our working force in South Carolina that are in the union. I will not surrender my conviction that we need them and I will continue to fight to organize workers, and I know that it is not easy for me after some 30 years of fighting the Haynsworth firm, I have sued nearly every company that Judge Haynsworth had stock in. I didn't know that he was helping to support my family until I read it in the paper. I have got cases against his——

Senator ERVIN. Excuse me for interrupting for one minute. I forgot to comply with a request made by Senator Hart. Senator Hart is detained at an executive session of the Violence Commission which is now engaged in drafting their final report and for that reason is unable to be here this morning. I wanted to make that clear on his behalf at his request.

Mr. CULBERTSON. Thank you, sir.

I have cases now against that firm, I know all about Judge Haynsworth. I know everything about him. I know his connections, I knew his father, I knew his grandfather, and I have had dealing with them for years, and they are hard fighters but thank the good Lord I have whipped them 95 percent of the time.

[Laughter.]

Now, I have done that with terrific odds against me. Not only have I whipped them but I have whipped all the other big firms, and I do it in a very hostile environment, and I have got to know how to move around and hit them when they are not looking for me, and I do knock them out most of the time, but they take it gingerly, they can afford to pay, I don't hit them too hard and I don't want to kill them because they help me make a living.

But I have never abused them, but I fight them hard, and I think, Senator, that it is right significant that with this reputation that I have for being an NAACP lawyer, which I am not, I wish I were, I would like to represent them, but Matthew Perry, a black Negro man from South Carolina is their general counsel for the NAACP and they give him all their business. They don't give me any of it, but I am not complaining because I can do without it, but I wish I have got the money that I was accused of getting for sympathizing with the civil rights movement, and, you know, it is not very easy for a man whose people have lived in South Carolina for over 200 years to take a position that I take in South Carolina. Senator Ervin, you know that. I came to Henderson, N.C., Judge Mallard presiding, the Vance County trial of TWUA men, and the jury from Franklin County, came over to Vance, and which I said I thought was a big mistake for the defense counsel to do, they had associated Hugo Black, Jr., to represent the union up there and I told them "That is one of the biggest mistakes you can make because they are going to convict you and when you go to the Supreme Court, Judge Black is going to have to disqualify himself," which he did. After they were convicted I came to North Carolina and associated with the attorneys up there, investigated that thing, I think they got a raw deal, they went to the Supreme Court with Arthur Goldberg, and thank the good Lord he thought enough of me to let my name appear on the pleadings. It didn't have much effect because we only got one vote

up there and we didn't have Judge Black because he disqualified himself, but they didn't listen to me and I wasn't their attorney of record.

But I have been in the thick of the fight. I am an activist, I am not a theorist, and I try to win these cases.

Senator ERVIN. If you will pardon me——

The CHAIRMAN. Excuse me, Senator. You say you have known Judge Haynsworth for how many years?

Mr. CULBERTSON. How many years have I known him?

The CHAIRMAN. Yes, sir.

Mr. CULBERTSON. Well, I have known him ever since 1937 or before that, I guess, because I had been secretary, not a real secretary, but I was a stenographer and clerk, for Congressman John J. McSwain from Greenville for the Fourth District and I went there when I was starting to work for him as a stenographer in his office and there is where I met the Haynsworths and I have known Judge Haynsworth——

The CHAIRMAN. What do you think about his nomination to the Supreme Court?

Mr. CULBERTSON. Well, Mr. Nixon didn't ask me about it but if my man had been elected, which was Vice President Humphrey, I would have not recommended that they give the job to Judge Haynsworth. I would have recommended that they put Arthur Goldberg back on. I like the Warren Court. I think they have done a wonderful thing. I know that is not popular, too, because they have in South Carolina signs all over the State, big roadside signs, "Impeach Earl Warren." I felt like if I were a vicious kind of man I would be kind of glad if someone burned one of them down, I didn't do it.

But when he appointed this man, Judge Haynsworth, I said "Well, what else can you expect?" [Laughter.]

Mr. CULBERTSON. This is a ball game, we play for keeps. Wouldn't I be a fool if I were the President of the United States and running on a ticket with ADA and the NAACP and Martin Luther King and that sort of thing and I got elected, and I turned around and appoint Clement Haynsworth to the Court they would say that I had deserted them.

But I say that they won the election, and they have got a right to appoint people with their philosophy, and as long as he is honest, that is the point that I make.

The CHAIRMAN. Well, is he honest?

Mr. CULBERTSON. He is absolutely honest. He has impeccable integrity. He is a man whose word I would believe about anything. I have never put into writing any agreement that I have had with the Haynsworth firm. They are honorable people. They have a different philosophy from me because I am a real genuine double-dipped Democrat, and they are not liberal enough for me. I want them, to see them go further.

The CHAIRMAN. What about Judge Haynsworth's legal ability?

Mr. CULBERTSON. Legal ability?

The CHAIRMAN. Yes.

Mr. CULBERTSON. Judge Haynsworth, in my opinion, has one of the best legal minds, the most incisive mind that I have run into.

Just before he went on the bench, to give you an example, they had a contract, Saco-Lowell had a contract, with a Negro woman, it is not popular to call them Negro now, I have to say a black woman, that washed dishes for them, and her father had, on 6-cent cotton, acquired about 150 acres of land and they had gotten a contract from this woman, Saco-Lowell, through Daniels Construction Co., to erect a plant over there over at Pickens, and she had agreed to take $150 an acre for it, and she found out that that wasn't enough and found out who wanted it. And so she wanted more money, and she came to get me, and I went over there and the lawyer with Mr. Daniels, who served in the Senate up here, Jim Byrnes appointed him, was there, and we dickered back and forth and finally they said, Well, we will, Mr. Daniels said, We will enforce the contract. He told Mr. Haynsworth, go ahead and sue. Well, I said, they wanted to build a plant there. I said, Go ahead and sue us. I knew I could tie them up for about 2 years. So they said, What will you take? I said, We will take $450 an acre. And so, OK, we will pay it.

The woman said No, I want the rent from this house on it until it is torn down. OK, we will give you that.

She said, "In addition to that I want you to dig me a well across the road in my new house. They didn't want to do that but they did, so she was a better negotiator than I was but she got it, and when we agreed to that, Clement Haynsworth sat down in the back of the car and he took a pencil, and he wrote a better, out of his head, a better worded agreement than I could ever do in my life even with a form book, but he did it just that simple.

Clement Haynsworth's mind, legal mind, is really sharp and he is a competent man. Now, don't misunderstand me, he has decided a lot of cases. I take a lot of cases on social security for disability before that court and I haven't had much success up there, and I have got some of those, one of those cases on the way now, on the pauper's oath, to the U.S. Supreme Court, but what I am saying in response to Senator Eastland's question is that he has a good a legal mind as there is in the United States, in my opinion. Now, I don't know whether that answers that or not.

The CHAIRMAN. And he has made a fair judge?

Mr. CULBERTSON. What is that, sir?

The CHAIRMAN. He made a fair judge?

Mr. CULBERTSON. If I didn't believe he was fair and honest, Senator, a thousand mules couldn't pull me from South Carolina up here.

Nobody is paying me for this. I am hoping before I go back that I am going over here to the Teamsters place and pick me up a check for $2,500 that they owe me.

[Laughter.]

For defending them. Not long ago in the Federal court in South Carolina they were sued for $85,000 by one of the worst labor-hating busting law firms, I mean lawyers, in Greenville and sued them for $85,000 and I went up there and knocked them out of the box and they didn't appeal it so I am going to take my $2,500, if I can find somebody over there who can sign a check, and I am paying my own expenses. Nobody forced me to come up here, nobody. Nobody has induced me to come, and I wouldn't do this if I didn't think it was

right. Because here is what I say. When they start to attacking the Supreme Court of the United States, and they make a mockery and put a man through an ordeal, I think it is a reflection on the Court, I think it does harm. I hope—I don't know what the reason for this is. They won the election, they have got an honest man.

President Nixon has a mandate, I think, from the people of this country to go off in a new direction. They are not people—it doesn't please me, but the majority of the people in this country have said to President Nixon, we want you to change the directions of things, and if you are a President like President Roosevelt he wants somebody on the Supreme Court that kind of looks at it his way.

Now, sooner or later we are going to come back.

The CHAIRMAN. Let me ask you this question.

Mr. CULBERTSON. Yes.

The CHAIRMAN. Have you been abused for coming here to testify?

Mr. CULBERTSON. Well, I haven't been whipped. I have been talked to and criticized but, it is sort of like, may I say, you all always are telling good stories and I am going to tell you a little one if you don't mind.

I have been so abused, I had crosses burned in front of my home and called "Nigger Lover" and everything you can think of and I am used to it, and it is sort of like this white man with the colored man were waiting their execution, a man came around and asked them, What do you a'l want for breakfast this morning? The white man said, I don't want nothing. The colored man said, I want some ham, and I want some 'taters and grits and watermelon, some cornbread, and told everything he wanted. And the white fellow turned and said, How can you do that? He said, Well, we are guilty, we knew we were going to have to do it. He said, You are crying here. Here I am, I am just going to enjoy it as long as I can, and the white fellow said to him, Yes, I know that but, he said, You are used to it. [Laughter.]

The CHAIRMAN. Let me ask you this question: You are president of the bar association?

Mr. CULBERTSON. Yes, sir.

The CHAIRMAN. You have got 300 lawyers?

Mr. CULBERTSON. I haven't counted them, head counted them or nose counted them——

The CHAIRMAN. That is, lawyers both white and black?

Mr. CULBERTSON. Yes, sir.

The CHAIRMAN. State whether or not they endorse Judge Haynsworth.

Mr. CULBERTSON. I think really, Senator, that the bar was kind of surprised. When I saw this, I saw all the stuff in the paper, and I didn't think that the bar thought that John Bolt Culbertson would call a meeting of the bar because he is always on the other side and he is not going to do anything to help Judge Haynsworth. But all the lawyers voted for me and I think, Senator, that with my reputation that they must have a pretty good respect for me to let me be the president of the bar, and I said in a spirit of fairness the only thing to do, wouldn't it be something if a man comes up here and they said, why, his own bar didn't endorse him, and they didn't take action, so I asked one of the fellows to prepare a test resolution, and I notified

everybody by letter or by card of the meeting and the purpose of it, and we had that meeting. We have two Jews, we have one Catholic, and a Lebanese, we have two Greeks, I call them Greeks, they are Americans of that dissent, we have Unitarians, we have three women, and we have different kinds of people, and I saw to it that everybody was notified, and they came in, and we put the resolution, and I gave everybody a chance to be heard, and not a single person voted against it.

It is significant, I think, Senator, that the president of the National Association for the Advancement of Colored People in Greenville County is a Negro lawyer named Mr. Willie T. Smith. I called him before I came up here and I asked him, I said, Will, what are you going to do about this? He said, I am like you are, I am on the spot. He said, I am going—he said, I have been getting letters from Roy Wilkins saying that "we are going to make the kind of a fight we made against Parker" and so forth, and wanting us to write to Senators and so forth, and I said that would be a foolish thing. Senator Hollings, that is his man, you think you are going to change him? I know you ain't going to change Strom Thurmond. You are not going to do that, and he said, Well, I am going along with the nomination endorsement by the bar.

Now, isn't it significant, Senator, that——

The CHAIRMAN. That was the NAACP attorney?

Mr. CULBERTSON. Yes, sir.

And isn't it significant——

The CHAIRMAN. Was he State president?

Mr. CULBERTSON. No, sir; he is the county president of Greenville. We have over 30,000 Negroes in Greenville County.

Now, isn't it significant that the general counsel for the NAACP is Matthew Perry from—who is now representing all 50 States, he lives in South Carolina, but he is now most of the time in New York.

Now, Mr. Roy Wilkins is on a 30 day vacation in Europe and where is Matthew Perry? There is not a single Negro that I know of connected with the civil rights movement, the respectable civil rights movement, that I know of, that has indicated any desire to come up here and attack Judge Haynsworth. Now, I think that is significant.

Now, as I say I am an old horse, I have been around, and I have been in these battles, but I would want to know who speaks for the Negroes in South Carolina. Does Roy Wilkins speak for them? I wish he would come and go with me into the hot holes that I go in to fight these battles.

To give you an example now of what I am talking about, Senator. On the day that the decision came out, someone called it Black Monday, outlawing segregation in the public schools, I was in Jasper County, S.C.; 8,000 Negroes live in that county, and 4,000 white people, and those people asked me, they were not satisfied with the type of justice they were getting, asked me to come down there, and I went, and the day that we were fighting this battle down there to put Negroes on the jury this decision came out. There were no Negroes on the jury.

I was making a vigorous fight down there, and I was living in the home of a Negro leader of the NAACP, and at night they surrounded the house with guns to protect me. During that fight in the courtroom, they took a little recess and I went outside, and one of the people

threatened to kill me. I go back up in the court and I said to Judge Johnson, I said, "Judge, your honor, not that I am afraid"—although I was a little bit afraid—I said, "Not that I am afraid, but"—I said, "They just made a threat against my life out there that they are going to kill me for what I am doing down here."

Judge Henry Johnson said, "Well, Mr. Culbertson," he said, "I can understand how these good white people would feel about the way you have been conducting yourself down here"—

[Laughter.]

Mr. CULBERTSON. But, he said, "I am sure that out of respect for me that they won't kill you in the courthouse."

[Laughter.]

Mr. CULBERTSON. Sometimes when I hear about these so-called civil rights lawyers, I wish they would come and follow in my footsteps for about a month.

The CHAIRMAN. Now, you state, you say in your statement, "I would not be afraid to submit any case of mine for Judge Haynsworth's decision."

Mr. CULBERTSON. That is correct, that is correct.

Let me tell you, Senator, about a case I have right now, well just a little while back. I was called down to Berkeley County, S.C., that is Mendel Rivers home, and he was born there, Goose Creek, I think they call it, and they have, about 70 percent of the population there are Negro, and the white people have run everything for years down there, and this colored boy had got accused of raping or attempting to rape a white woman in her house, and he was in jail, and his mama had gone and mortgaged her home and gone to another lawyer, a white lawyer, down there, and he had been in jail and in and out of the State mental hospital to be examined for mental conditions and they found him sane and sent him back down there for trial and he couldn't make the $10,000 bond and he had been rotting in the jail.

So his mama came to Greenville, about 250 miles, to ask me to go down there and see what I could do.

And I went down there and talked to the sheriff and I talked to the judge and I talked to the solicitor, and I told them, I said, "I don't think this boy is getting a right deal. He has been in jail all that time now." To make a long story short, I never did get all my fee, but they agreed to turn the boy loose. And so far as I know he is still loose and he ain't never been tried.

I went over in Hampton County not long ago, and they had this boy charged, colored boy, whose daddy owns about 8 acres of cucumber land, had a little automobile wreck and they took him with a criminal warrant. I went down to Hampton to try the case and I asked the judge, magistrate, I said, "How did you all pick the jury?" And he proceeded to tell me how they picked it. I said, "Why didn't your constable pick the jury?" "Well, he is going to be a witness." I said, "Well, why didn't you have the deputy sheriff to pick it?" Well, he said, "The sheriff is an uncle of the boy." I said, "Mr. Magistrate, call in a stenographer here and let's get a little stuff on the record." I said, "How long you been magistrate?" He said, "I have been magistrate 40 years." I said, "Did you ever have any Negroes on the jury?" He said, "Come to think of it, I don't believe I have. But I treat them right."

I said, "Well, let's go into this thing a little bit." That is as far as we went. Still no Negroes on that jury.

Now, I have got to go down there, they have abandoned the criminal part and now they are suing him civilly, they are trying to get the 8 acres of cucumbers, but old John Bolt Culbertson will stand between them and him, and I will wager they will never get no cucumbers off of that land.

Now, I have been fighting that kind of a battle for the last 30 years, and would I come up here and throw my reputation, my honesty, my integrity and everything away at 61 years? I just got 1 more year to go, if I can make it I get social security.

Senator ERVIN. I will ask you——

The CHAIRMAN. Let him finish.

Mr. CULBERTSON. All right.

Now, let me go back just a minute. I had a visitor in my office a while back saying that he was sent by Mr. Meany to talk to me about Judge Haynsworth. A lot of people have called me about this, and I don't feel at liberty to go into what I said and what was said because I have discussed this thing in depth, and right after he left, he was a civil rights man, I got his name but I won't use it——

Senator BAYH. Could we have it, Mr. Chairman, so we could——

The CHAIRMAN. Yes. Do submit it, please.

Mr. CULBERTSON. Mr. E. T.—I am having a little trouble with my eyes—Kehrar, southern area civil rights director, Atlanta.

The CHAIRMAN. Was he there trying to get something on Judge Haynsworth, is that it?

Mr. CULBERTSON. Well, I think that is what he was there for—and if I had something on him I would give it to him, too.

You know if I thought this man wasn't honest I sure wouldn't be up here for Haynsworth. I make a living practicing law, and if I had something on him that I thought was going to affect my case I don't care who it was, Judge Warren or whoever it would be, I don't care, I am going to represent my client come hell or high water, I don't care whose feet I step on, and I would step on him if I thought I had something.

So this man, I won't go into what he said to me and what I said to him because I think that is privileged, but he called me later on the phone that day and said, "I have just found out that Judge Haynsworth belongs to the Green Valley Mountain Club or something like that, as an exclusive golf course, in the place where they all have a good time, and the Ponsett Club." I said, "Well, that is probably so." He said, "Do they discriminate?" I said, "I think they do." I said, "I can't know for firsthand because I ain't welcome in there either."

[Laughter.]

Mr. CULBERTSON. So I said, "Yes, I think so."

I said. "Now they don't have any Negroes in there unless it is somebody who wears a white coat, that is the only way a Negro can get in there that I know of. "I went one step further, and said, "They don't take any Jews in there, I don't believe," so they thought they had something there. I don't know whether it does or not. But if you start excluding everybody who belongs to some kind of organization you

are going to sooner or later be walking around entertaining yourself because I know a lot of Negro clubs in Greenville that won't let a white man come within hearing distance of the thing much less let them come in. They are as exclusive of that, and there are a lot of Jewish organizations certainly where they don't want any gentiles in.

And I know that Judge Haynsworth is connected officially with Furman University and they have Negroes there, it is a Baptist college, they have Negroes there. I know that he is a member of the Christ Episcopal Church. My little children, I have one eight and one nine, I think that is pretty good for me——

[Laughter.]

Mr. CULBERTSON. They go to school, they go to school at Christ Episcopal Church although I am a Presbyterian, they have got a good school over there and I send them over there, and he is a big shot, the judge is, Judge Haynsworth is. I can get in that church, but Judge Haynsworth, he condones at least, accepts, he doesn't fuss about it, they have Negro children in that school, going to school with my children, and Judge Haynsworth is there, and Judge Haynsworth belongs, so I am told, down here to some exclusive club in Richland, lawyers club, and they have Negro members in there. So he is no segregationist. If they are trying to make that he is a rank arch dyed-in-the-wool segregationist or racist they are just wasting their time.

The CHAIRMAN. Well, they checked him out, they investigated him, at his home, and all they found was that he belonged to a country club, was that it?

Mr. CULBERTSON. Well, they checked him out and found he belonged to those two, I guess he belongs to them, I don't know. If he goes on the Bench I am going out there to find out, I can say, well this is John Bolt Culbertson, he is a Haynsworth man, and I might get in.

(Laughter.)

Senator ERVIN. Off the record.

(Discussion off the record.)

Senator ERVIN. I want to ask you if you agree with me that no single American and no group of Americans have a right to demand that no one will be appointed to the Supreme Court except those who will do their bidding or will share their views. Isn't the only thing we can ask is that appointees to the Supreme Court will be men who accept the Constitution as their guide and who do the best they can with all the fallibility of human beings to inform themselves about the merits of the case and then reach conclusion with respect to which they believe to be an honest conclusion?

Mr. CULBERTSON. Yes, sir.

Your honor, may I say this: When the American Bar Association called me, they didn't know I was president of the bar, they didn't call me for that reason, they called be because they thought again, my name had been given to them by someone and I told them substantially what I am saying here, and I said, How can you pick a judge that has not lived, I said, you can't raise them in a vacuum. You can't come to the bench sterile. He has got to have some experience, and the real criterion and test is the honesty and integrity of the individual. They make a lot about textiles. It is true we have textiles in Greenville, and nobody can be involved in making a living or in

politics or anything else that is not touched by the textile trade, but just to say that he is "Mr. Textile" or something, you have got to go to the character and the nature of a man.

Now, if he was a one-sided individual, if I thought he was vindictive or dishonest, I would be the first man to get on the stand in South Carolina and I would tell it all. I don't never hold anything back. And let me say this, your honor, if I may, some people asked me today, the News and Courier reporter, a black man here, Mr. Price, I think is his name, he said they want to know back in South Carolina what John Bolt Culbertson is doing up here. Let me read to you, just a second, "Certificate of Merit awarded to John Bolt Culbertson in recognition of praiseworthy service in the area of political action in efforts to secure equality of opportunity in behalf of the underprivileged by the South Carolina Conference of Branches, National Association for the Advancement of Colored People." Signed J. Hubert Nelson, president, D. C. Francis, secretary, J. D. Quincy Newman, field secretary. At the 24th annual State convention, November 11–14, 1965, at Sumter, S.C.

Do you think that I would prostitute myself and give up all that I have ever lived for and fought for to come up here and express a dishonest opinion? If I have to be condemned and criticized by my longtime friends and associates for honestly stating my convictions then what is America for?

Senator ERVIN. Your convictions are stated in a written statement you filed with the committee in which you state this, among other things——

Mr. CULBERTSON. May I just read that and get it in the record, if I may?

Senator ERVIN. I was just going to single out this and then do it—

I predict that Judge Haynsworth will prove to be one of the greatest Justices of the Supreme Court that ever has been on this Court. If I were a member of the U.S. Senate, I would vote for the confirmation of his appointment.

Mr. CULBERTSON. Yes, sir, I said that and I swear to it if you all want to swear me.

This is my statement that I dictated just off the cuff. I came in to the office, I was told that the Department of Justice, someone had called and wanted to know if I would make a statement, that I would have to have it in at a certain time. I dictated it right off the cuff to my secretary. She typed it and mailed it up here without my ever having read it, but substantially it is my views and I would like for the sake of the record to put it into the record.

Senator MCCLELLAN. It can be inserted in the record unless you prefer to read it.

Mr. CULBERTSON. I would prefer to read it, if you don't mind. It is short.

Senator MCCLELLAN. You may proceed.

Mr. CULBERTSON. Greenville, S.C., the birthplace and residence of Judge Haynsworth, is internationally known as the textile center of the world and the metropolitan area of the city of Greenville itself, not including the county, has a population of almost 260,000 people. Among its many fine educational institutions can be listed one of the finest universities in the Nation. This is Furman University, the brain-

child of and named after Richard Furman, the great, great grandfather of Judge Haynsworth. The Greenville County Bar Association is comprised of approximately 300 members, including three Negroes, one member of Lebanese decent, and one member of Greek descent; also, at least three women, one Unitarian, two Jews, one or more Catholics, and there are two blind members, and others of various religious faiths. There are also, especially lately, many members of the Greenville bar who are professed Republicans, but the great majority of our members still profess, outwardly at least, Democrats. It is my belief that the prevailing sentiment in our community is antiunion, and that as a public policy, most of our elected officials are opposed to unionization of municipal and State employees. This viewpoint is not shared by several members of our bar association, especially me. I would say that the great majority of all the people of Greenville County is opposed to school integration, as a matter of fundamental belief, but as law-abiding citizens, our people believe in law and order and attempt to comply, in good faith, with mandates of the Federal courts in carrying out the decisions laid down by our U.S. Supreme Court.

There is still a lot of resentment within the community as a whole, against the policies of the Department of Health, Education, and Welfare and recent decisions of the U.S. Supreme Court, under both Democratic and Republican administrations. Of course, our bar association, being drawn from the general population, reflects these sentiments but, for many years I have openly endorsed the principles of civil rights for all people and have fought many fights in the courts and in the political arena, advocating and supporting civil rights and organized labor. This has not been a popular position, but I have never wavered nor withdrawn from the battle. I am still a stanch advocate of these principles. I am, therefore, very grateful and humbled by the recent action taken by the members of our Greenville County Bar Association in electing me, without opposition to be president for this year, of our Greenville Bar Association. I consider this honor by its members of my profession as an expression of their confidence in my honesty and integrity and I am, therefore, doubly careful to be accurate in what I say today before this committee.

On September 2, 1969, at 11 a.m., the Greenville County Bar Association met in the Greenville County Courthouse, in the courtroom, for the express purpose of considering a resolution to endorse Judge Haynsworth for a position on the U.S. Supreme Court. Individual notices had been timely sent to each and every member of the bar association. A resolution to endorse Judge Haynsworth was presented by Mr. A. F. Burgess and a motion made and properly seconded, to adopt this resolution. A copy of the resolution has already been filed with this committee. Ample opportunity was given to everyone to discuss the resolution, both pro and con. There was, however, no objection whatever to the adoption of this resolution, and the resolution was then unanimously adopted. It is significant, I think, that no Negro lawyer opposed the resolution, especially in view of the fact that one of our Negro members, Mr. Willie T. Smith, is the county chairman of the Greenville County branch of the National Association for the Advancement of Colored People.

Now, I had put another thing there about ADA but I am not going to read it there.

It is significant that there was another lawyer there that represents some AFL unions, and he voted for it. That is Mr. Richard J. Foster, one of the most prominent and successful lawyers at the bar.

If there is any member of the Greenville Bar Association who is opposed to Judge Haynsworth's confirmation, I have been unable to determine his or her identity. And since that time I am told that the entire executive committee of the State bar of South Carolina has unanimously approved this endorsement.

I think that this speaks mighty highly of Judge Haynsworth. Nobody knows a lawyer's reputation better than his fellow lawyers, especially when the lawyer in question has been in the profession for a number of years. There are, I am sure, several members of the Greenville County Bar Association, including myself, who do not always agree with Judge Haynsworth's decisions nor with his economic and political philosophy, but I know of no one who does not respect Judge Haynsworth as a man, as a lawyer, and as a judge. I have had some experience as a special agent with the FBI in years gone by, in investigating applicants for Federal jobs, including district attorneys and judges for the bench.

Now, I don't recall exactly, I want to be specific about that, I know I was trained in that and I recall at one time I was in Nebraska or Iowa investigating, I believe it was, a Federal Judge and some district attorney and I would say if I haven't investigated all of these, I have been trained to investigate applicants, and I must confess that I have, on my own, gone through Judge Haynsworth's background with a "fine-tooth comb," and I have not discovered anything which I think could possibly disqualify Judge Haynsworth, either as a Federal Judge or as United States Supreme Court Justice. I may not always agree with his decisions, but he is an honest man, he has perfect judicial temperament, he is both competent, industrious, and able. I am convinced that he decides each case on its merits as he sees the merits, and that he tries to do the just and right thing in all situations. He does not, in my opinion, prejudge any case. By background and education, I would consider him to be conservative in his thinking, and that he is not the kind of judge who would try to legislate law by Court decision, but who follows precedents already established. I would not be afraid to submit any case of mine for Judge Haynsworth's decision. I am a Democrat, I was for years, for a good many years ago when I was younger than that, I was State president of the Young Democrats of South Carolina.

Hubert Humphrey was my candidate for President. I was asked, by the way to head up the South Carolina forces for McCarthy but I told them no, I can't do that. I am a Humphrey man. I donated $500 in this last campaign and I will give him more if he is again a candidate. I will tell you where I got that $500. Had this white boy and Negro from New York charged by the FBI for stealing a car and bringing it into Greenville. I represented the Negro, some other lawyer represented the white man. I charged him $500 during that campaign, and I got a directed verdict from the judge of innocent and my colored man went back to New York and the $500 went to Hubert Humphrey and I will get him some more money if he is a candidate.

Had Mr. Humphrey won I would have advocated his appointment of Arthur Goldberg to the Supreme Court. I would not have sug-

gested Judge Haynsworth. I was happy when Arthur Goldberg was appointed to the U.S. Supreme Court by President Kennedy and I was happy when President Johnson appointed Thurgood Marshall to the U.S. Supreme Court. I might say that I spoke with Thurgood Marshall in Jackson, Miss., and Columbia, S.C., and I spoke with James Foreman of the CORE in Columbia, S.C. I am not bashful, and I would be happy to see Arthur Goldberg back on the Supreme Court. But President Nixon won the office, and it is his prerogative to appoint the members of the U.S. Supreme Court. We Democrats lost. It is my feeling that President Nixon has a mandate from the American people, including the people of South Carolina, who gave him her votes.

I feel, therefore, that President Nixon owes an obligation to the people of this Nation to appoint to high office men and women who are qualified to carry out the promises that President Nixon made during his campaign. That applies, of course, to appointments to the highest Court of this land. If President Nixon searched the whole Nation over, looking for a man to appoint to the Supreme Court to fill this requirement, he could not find a more ideally suited man for the job than Judge Haynsworth. I hope that my friends in the civil rights movement and in the labor movement can understand and appreciate my position concerning this appointment because while I agree with them in many, many ways, and I think that some good will come out of the protests by them, nonetheless, I believe that they must agree with me that this is President Nixon's appointment; he has picked a fine man, and I am confident that once he is seated, which he certainly will be, that all their fears will disappear. I predict that Judge Haynsworth will prove to be one of the greatest Justices of the Supreme Court that ever has been on this Court. I believe that my friends of liberal persuasion can understand that if we have the right when our crowd is in power, to appoint our Judges, then our opponents, by the same token, have this right when they win. As a South Carolinian, I shall be proud to have Judge Haynsworth on our highest Court and if I were a Member of the U.S. Senate, I would vote for the confirmation of his appointment, and for this endorsement I do not apologize to anyone.

I have stated my honest views and I thank this committee for the opportunity of permitting me to do so. That is my written statement.

Senator McCLELLAN. Thank you, Mr. Culbertson.

Just one question. I read your statement, and I heard most of your testimony this morning, and as I understand it, your position is that no one can have a legitimate or valid reason for opposing this confirmation on the grounds of lack of character, lack of integrity, lack of legal capacity, or lack of judicial temperament?

Mr. CULBERTSON. I agree with you. If this man were a surgeon instead of a judge and if he had the qualifications to be a surgeon I would risk my life in his hands. That is about as clear as I can make it.

Senator McCLELLAN. Thank you very kindly.

Senator Cook?

Senator COOK. Mr. Culbertson, I want to say to you that you represent an individual with the most sincere convictions of anybody that it has been my privilege to hear in the 10 months that I have been here in Washington and I just want you to know that.

Mr. CULBERTSON. Thank you, sir. I hope I live long enough to come and campaign for you.

[Laughter.]

Senator COOK. I want to ask you a couple of questions. Either yesterday or the day before there was read into the record all of the companies that Carolina Vend-A-Matic did business with in South Carolina and during the course of that the point that was to be made by the individual who went through this list was that he wanted to show that the biggest majority of these companies were textile companies.

Would you say, as a life-long resident of the State of South Carolina that if any business went into North Carolina and had to do business with any other businesses that it would wind up doing the majority of its business with textile companies?

Mr. CULBERTSON. You speak of North Carolina?

Senator COOK. South Carolina, I am sorry.

Mr. CULBERTSON. We have in Greenville, S.C., the worldwide textile exposition where people come from every country in the world that makes textiles to display their wares. You do not do business and make a living in Greenville, S.C., unless some way you are connected with the textile trade.

Senator COOK. Well, let me put it more bluntly. If you were in, let's say, a service-type company, as this company is——

Mr. CULBERTSON. Yes.

Senator COOK (continuing). And you wanted to survive, let's say, in the Greenville area would the biggest percentage of your business by far have to be done with textile companies?

Mr. CULBERTSON. Yes, sir, and may I say this, there is a competitor, Atlas Vending Co., in Greenville, that competes with Vend-A-Matic and he mailed me a letter, he heard I was coming up here, and in his letter he comments on the character of the opposition, and he is most high in praising the Carolina Vend-A-Matic for the ethical conduct of his business, and he is their principal competitor and he is the one who won a lot of these contracts from Deering Milliken that Carolina Vend-A-Matic did not get.

Senator COOK. Let me ask you another question, lawyer to lawyer.

Mr. CULBERTON. Yes, sir.

Senator COOK. Mr. Harris, as counsel for the AFL–CIO, yesterday spent most of his testimony on the fact that 10 labor cases went to the Supreme Court from the Fourth District and that all 10 of them were reversed and based on the zero to 10 record that this indicated absolutely to his mind that Judge Haynesworth was antiunion.

He refuted the contention of Senator Ervin and he refuted my contention that you should take into consideration all of the labor cases that were decided by the Fourth District and on that basis decide truly whether Judge Haynsworth was or was not antiunion if that has anything to do with the confirmation of a Justice on the Supreme Court.

Now, do you not feel that if you, as a lawyer, were to do a total job of evaluating someone that you would not take 10 decisions that went to the Supreme Court of the United States but that you would have to consider all of the decisions that the Judge had rendered at both the Fourth Circuit level and the decisions that were appealed to the Supreme Court of the United States?

Mr. CULBERTSON. Senator, I don't see any other fair and honest way to do it. They are all important cases to the litigants and whether they

reached the Supreme Court or not it is the way they are handled as to whether or not a man shows his bias.

Now, I am quite sure that Roger Milliken who is a big Republican in South Carolina, is a moneybag, and owns this company, that he is not happy at all with Judge Haynsworth's decision, and I agree, and I believe that that mill was shut down to intimidate other workers, and I believe that Roger Milliken should have to pay for them and not the 200 minority stockholders down there. So I think that the Judge did what he honestly thought was right, and his connection, that little connection he had with, what, about 400, about $600 of something, that wouldn't influence him. The man—I am not saying this to defend him. He doesn't need John Bolt Culbertson to defend him. He is going to get confirmed anyway, whether I come up here or not, but as one of the witnesses said the other day, as an officer of the court it is as much my duty to come here and defend our institution as it is—I owe to that duty to the court whether I agree with him or not. I don't want to tear the court down, I want to build it up. I don't want to always have my friends stacked on the court. It is a good feeling to try a case and you have a friend sitting on the jury but I don't want that, and a judge has got to rise above those things, and if I didn't think that Judge Haynsworth was qualified and was going to make a good judge I would be the first man to say it and I would make my crowd very happy by saying it. But I just cannot stultify my conscience and come up here or remain silent and see him crucified.

I think he is a competent man. I think he is a fair judge and, as I say, I am willing to submit any of my cases to him at any time, and if he didn't feel that he was qualified he would say, I will get out of the case. What more can I say.

Senator Cook. Mr. Culbertson, I am delighted you brought your wife with you because she ought to be mighty proud of you being here.

Thank you, Mr. Chairman.

Mr. Culbertson. May I give you gentlemen, and I was told not to do this, but I just feel I must say this: In the field of civil rights Martin Luther King was my friend. He asked me to come to Montgomery in the bus strike, the bus walkout. I went there with Mahalia Jackson and those people, and I did what I could.

I went out to Columbus, Ohio, Cleveland, Youngstown, I spoke to 8,000 people out there with the AFL–CIO, the civil rights leaders. I have never asked for any compensation because I feel that one man, Senator, dedicated to a proposition can have a far-reaching influence.

I have been down in Alabama, in Montgomery, Florida, Georgia, and Mississippi, St. Nicholas Arena in New York, everywhere they have asked me to go, without compensation, to fight these battles, and I want to say this to some of these people who think they can't get justice in the South. I went down to Laurens, that is where I was born, and there is a lot of hatred down there, both sides, had this colored man charged with breaking in a white man's house and scared his children to death. He was drunk they say, he broke the window. I went into that situation, got called every kind of name, but when I walked out with him the judge said, Hugh McFadden from Clarendon County, presiding, Come back here, Mr. Culbertson, I am going to order the sheriff to give you a ham. He said, You got everything else, I might just as well give you a ham, too, and so I walked out with my client.

As I told you, I was down to Berkeley not long ago, in Oconee County, they had this Negro charged with breaking into this white woman's house in the husband's absence, he lost his job on account of it. I went into that situation and I won that case for him. And I won't go over many cases that I have tried but I have got a case right now where this Negro is charged, and he is going to be tried in October, with breaking into two houses, robbing the people, and raping one of the women, white people, and I am going to try that case in October.

Senator COOK. I have a notion you will.

Mr. CULBERTSON. I think I will, helped by the help of God, but I will say this that when I take a case I take it to win, and I will go back down there in the field, working and fighting and struggling for the things that these people who are opposing this nomination say they want done. I am down there doing the job. I hope I don't lose their friendship but I have got to do what I think is right.

Thank you very much.

Senator MCCLELLAN. Senator Bayh.

Senator BAYH. Mr. Chairman, Mr. Culbertson, I apologize that other business has sort of made me less than an adequate participant here this morning.

I appreciate your coming up here to give us the benefit of your personal experience and judgment. Although I wasn't here to hear your entire testimony I suppose it is fair to say that the overall thrust was that you came here to support the nomination of Justice Haynsworth?

Mr. CULBERTSON. Well, I didn't want to hurt him any.

Senator BAYH. I don't think you did, and it may or may not be relevant but I worked over on a farm in west Indiana the best part of my life and still have it in my family and once in a while I have time to spend there. And when the time comes that they want to take away my cucumber patch I would want to have a fellow named Culbertson defending me.

Mr. CULBERTSON. Let me say this, Senator. My mother and father didn't believe in birth control because we were raised on a little farm and they had 13 children and a couple of my boys have been in Indiana and attended Culver University which, by the way, is integrated now.

Senator BAYH. I don't necessarily concur in the conclusion that you reached on one or two items but I think the main thrust of your testimony concerning the personal thoughts about the young are in fact as you believe them, and I see no reason to inconvenience you further with those questions. I appreciate your appearance.

Mr. CULBERTSON. I noticed yesterday that you once or twice referred to being a neophyte lawyer. If I ever get to Indiana and they pick me up for a traffic violation I am going to call on you. (Laughter.)

Senator MCCLELLAN. Thank you very much.

Senator Griffin.

Senator GRIFFIN. I might just comment, Mr. Culbertson, that if you are a phony liberal or a phony Humphrey Democrat you are one of the best actors that there ever was.

Mr. CULBERTSON. Well, I hope I am not phony.

Senator GRIFFIN. Do you know who Mr. Joseph Rauh is?

Mr. CULBERTSON. Yes, sir; I do, I certainly do.

Senator GRIFFIN. You are a member of Americans for Democratic Action?

Mr. CULBERTSON. Yes, sir.

Senator GRIFFIN. You know who Mr. Joseph Rauh is?

Mr. CULBERTSON. I know him quite well.

Senator GRIFFIN. He sat and listened to a lot of your testimony.

Mr. CULBERTSON. He has listened to me before.

Senator GRIFFIN. Then I am confident that if there is anything inaccurate about your testimony you will hear about it.

You have been a very effective and very impressive witness. Thank you very much.

Mr. CULBERTSON. Senator, let me say this to you, you are from Michigan, I believe, aren't you?

Senator GRIFFIN. Yes, I am.

Mr. CULBERTSON. I spoke on a seminar at the University of Michigan last summer which is at Ann Arbor, the law school there, poverty lawyer, I mean lawyers who are supposed to fight poverty, and I was stationed in Michigan and worked out of Detroit with the FBI and that is where I first became convinced in the early days of the automobile workers effort to organize against Ford and I have been sympathetic to labor ever since. Well, I was born that way. I fought, all my life I fought against bigotry and prejudice of all kinds. You might be interested to know, Senator, that at the University of South Carolina I had a pretty effective political organization and one of the conditions of our support of our candidate was she must let me name a few of the girls to go on the court, and I assisted in the first time that they put a Jewish girl there and she was the first Jewess to be in the court, and she happened to be a sister to Leon Keyserling who you probably know now, and further, I saw to it that the first—I was president of the literary society, and they had an exclusion policy, they had no Jews but I put one there for the first time, and I named in honor of one of the publications we put out, I named Dr. Isador Schayer to be on it, a Jewish doctor.

Mr. Barney Baruch of New York, from South Carolina, let me have some money to go to school on and, as I say, I have fought prejudice and racism, I have tried to get it out of my system. I know there is a lot of it but honestly there is no man of any race, color or creed that I am prejudiced about. I am tolerant, and I am a great admirer of yours, too. I know you by reputtaion.

Senator GRIFFIN. Mr. Culbertson, you said that Judge Haynsworth didn't need your testimony to be confirmed, but I suspect that your testimony may be very helpful.

Mr. CULBERTSON. Well, I hope it is. Maybe some of these people who have been criticizing me will hire me to represent them now. [Laughter.]

Senator BAYH. Mr. Chairman, may I make one observation? Mr. Culbertson's presence here this morning is evidence of the way this committee traditionally does its duty—the way we reach a conclusion whatever it might be—that we can have differences of opinion with the witness on issues or personalities but what we want is absolutely the truth. From what you told us I have the distinct impression that you told it as you thought it was in your heart. Thank you very much.

Mr. CULBERTSON. Here is what I say in response to that, Senator, when you have had crosses burned in front of your house because of

what you believe, and you have got the guts to stand in a hostile community to do that, you have got to have the courage to face any situation, and I think I have got it. Is that all?

Senator McCLELLAN. Yes, thank you very kindly.

Mr. Fine, come around, please, sir.

We have one more witness and we are going to try to conclude before recessing and not have to come back this afternoon.

Very well, let's have order.

You may proceed, Mr. Fine.

STATEMENT OF LOUIS B. FINE, ATTORNEY, NORFOLK, VA.

Mr. FINE. My name is Louis B. Fine. I am 64 years old. I was educated at Georgetown University, and have a degree of LL.B. in 1925, and in 1968 Georgetown University was good enough to award to me a honorary degree of Doctor of Laws.

I was president of the Virginia Bar Lawyers' Association in 1965 to 1966, for 12 years an officer of the American Trial Lawyers' Association and a member of the Board of Governors.

I am a member of the Judicial Conference for the Fourth Circuit, and I was elected by the Integrated Bar, both black and white, to represent the city of Norfolk as its sole member on the State council for the Virginia State Bar.

I have lectured on Constitutional Law at Norfolk College of Law, and I am a member of a number of bar associations, including the American Bar Association and the American Judicature Society, and I am also a Commissioner in Chancery for the Circuit Court of the city of Norfolk, and the city of Chesapeake.

I have been on the Georgetown Law Journal staff, past president of the Civitan Club of Norfolk, and past president of the Jewish Family Service, former general chairman of the United Jewish Appeal, director of the Crippled Children's Society, director of the Multiple Sclerosis Chapter of Norfolk, Va., and presently a member of the Board of Regents of Georgetown University.

Senator McCLELLAN. Thank you very much. That is a very impressive background of honors and experience.

You may proceed.

Mr. FINE. I had the pleasure of meeting Judge Haynsworth when he was first appointed to the United States Court of Appeals for the Fourth Circuit. I have only known him as a judge and only socially as a member of the Judicial Council for the Fourth Circuit.

I have grown to love and respect him.

I represented the Teamsters, the Painters Union, the Carpenters Union, and the Longshoremen's Union of Norfolk. I have appeared for them in legal controversies before the Supreme Court of Appeals of Virginia, and I feel that it is my duty under Canon 8 to appear here, and I appear unsolicited by the Department of Justice or by Judge Haynsworth or anybody else.

I feel that the criticism that has been made by labor is unfounded, and I feel that the representation that has been made here that he is anti-Negro is not true, and I say that on the same basis that I am not anti-Semitic being of the Jewish faith.

Now, let us take his personal character which I will tell you gentlemen about.

As a member of the Judicial Conference of the Fourth Circuit, it is necessary to be appointed to that, and if you are appointed and selected for 3 consecutive years you become a permanent member, and during the time that Judge Haynsworth was Chief Judge he personally had more black men on the judicial conference who attended the Homestead and the Greenbrier at Virginia, not only as a member of the bar but socially to determine what was good and best for the fourth judicial circuit. This is a matter that he did not have to do. It was a matter of discretion, and I say that to you as a matter of personal conduct on the part of the judge.

I think it is manifestly unfair to have said that Judge Haynesworth was antilabor when, as a matter of fact, he only decided the cases and only wrote one opinion out of 10 that were reversed out of a total of 47. Even the Lord couldn't do much better under the total circumstances, and I say that while I have been and am representing labor, labor is not in a fraternity house with the judicial administration of justice. It is just like any other litigant, and that labor must depend upon the economic and social justice as it appears to a conscientious judge.

Such a man is Judge Haynsworth. He is a man whose integrity is without question, highly respected, and the record will indicate that far from someone saying, one of the Senators, the Senator from Massachusetts, as to whether or not he was against the stream, I will refer you gentlemen to a recent case which showed the progressive view of Judge Haynsworth. It was a case of *Thomason* versus *A. & P.* In that case there was a question about the construction of some Virginia rulings, and that case went along with the progressive view. That is one of the opinions of that court within the last 4 years.

Furthermore, I want to say to you that everyone who has appeared before the fourth circuit without question has always, without any hesitancy, respected his integrity, his judicial temperament, his qualifications. I predict that Judge Haynsworth will make a great judge, and he will be another great Justice Black from the South.

(The prepared statement follows):

PROPOSED TESTIMONY WITH REGARD THE NOMINATION HEARING OF CLEMENT F. HAYNSWORTH, JR., FOR ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

I am Louis B. Fine, of the age of sixty-four, a resident of the City of Norfolk, Virginia, a graduate of Georgetown University Law School, and have practiced law since I have been twenty-one years of age, making a total of almost forty-four years.

I am a Past President of the Virginia Trial Lawyers Association, formerly a member of the Council of the Virginia State Bar, have been an officer and a member of the Board of Governors of the American Trial Lawyers Association for twelve years, and presently am a member of the Board of Regents of Georgetown University.

I would like for the record to show that my appearing here is unsolicited on the part of anyone.

Judge Haynsworth is eminently qualified by virtue of education, character, integrity and experience to be an Associate Justice of the United States Supreme Court.

I have appeared before him in his Court in any number of cases. His grasp of the law and his opinions are crystal clear, and are based upon the ever-growing common law, with a total respect for law and order.

He is loved, admired and respected as one of our great judges.

All of his personal and official conduct reflects a disposition which is in conformity with the American ideals of equal justice for all people, regardless of race, color or creed.

I not only speak for myself personally, but as one who has represented both plaintiffs and defendants from personal injury actions to anti-trust suits, as well as one who has represented labor unions in my jurisdiction. I am confident that labor has nothing to fear from Judge Haynsworth.

I wish to state without any hesitancy that with Judge Haynsworth on the United States Supreme Court bench he will be one of the greatest American jurisprudence.

Senator McCLELLAN. Thank you very much.

I take it that a great deal of your practice is on the side of labor, reprsenting labor; is that correct?

Mr. FINE. I practice general practice, and I would say most of mine at this time, although I represented insurance companies originally, was on the side of the plaintiff bar and also labor.

Senator McCLELLAN. Then you would be regarded somewhat as a plaintiff's lawyer at this time?

Mr. FINE. Yes, sir.

Senator McCLELLAN. And a labor attorney?

Mr. FINE. Yes, sir.

Senator McCLELLAN. And you have had cases in his court, the fourth circuit, since his appointment, and followed closely the decisions he has rendered?

Mr. FINE. Yes, sir.

Senator McCLELLAN. You don't contend, as some maybe do or at least have indicated, that they want somebody on there that will be certain to decide in favor of labor or business or management or the defendant or the plaintiff, whatever the case may be, you don't want that kind of a judge; do you?

Mr. FINE. No, sir; I do not and, as a matter of fact, we know from experience where men who have represented insurance companies over the years, when they get to the bench, they have their own conscience and their own impartiality, and I think that that is the kind of man Judge Haynesworth would be.

Senator McCLELLAN. You don't think he has been or will be swayed by any bias or prejudice with respect to the type of case that is before him or the identity of the litigants?

Mr. FINE. Not one iota, sir.

Senator McCLELLAN. And you don't anticipate, in fact you feel confident that his judicious, high quality temperament and judgment will continue to prevail when he is on the Supreme Court?

Mr. FINE. I do, sir. But he has been associated with Judge Parker, Judge Soper, and Judge Dobie before he was on there. They were three giants in jurisprudence, and I know some of them, with his natural ability, rubbed off on him.

Senator McCLELLAN. Yes; very well.

Senator Ervin.

Senator ERVIN. Mr. Fine, do you not agree with me that the opposition to the confirmation of Judge Haynesworth is based on virtually

the same identical grounds on which the nomination of Judge John J. Parker was rejected?

Mr. FINE. I do, sir. I think that he will become one of the greatest judges on the Supreme Court, and this is false clamor.

Senator ERVIN. Do you not agree—you and I both live in the fourth circuit?

Mr. FINE. Yes, sir.

Senator ERVIN. Do you not agree with me that Judge John J. Parker was one of the great legal and intellectual giants of his generation and that one of the great tragedies which we have had in this Nation was the rejection of his nomination by the Senate?

Mr. FINE. Yes, sir; I put him in the same classification as Judge Learned Hand. They were two great giants.

Senator ERVIN. Now, speaking of Judge Haynesworth's decision in the *Gissel* case being reversed, if I understand it right, the Supreme Court of the United States in the *Gissel, General Steel Products*, and *Hechs* cases rejected the old rule of the National Labor Relations Board in determining whether they could resort to authorization cards to determine whether a particular union had the support of a majority of the employees and the Court laid down an entirely new rule, that the question was whether the employees had been induced to sign the cards available because it was represented to them by the organizers——

Mr. FINE. As an unfair labor practice.

Senator ERVIN. Yes. So the Supreme Court laid down a new rule.

In other words, the *Gissel* and *Hecks* cases were reversed on the basis of the announcement of a new rule which didn't exist when the National Labor Relations Board heard the cases and didn't exist when the circuit court of appeals passed on them?

Mr. FINE. The yellow dog cases.

Senator ERVIN. Yes.

Mr. FINE. I concur with you, Senator.

Senator ERVIN. Yes. In other words, Judge Haynsworth and the other members of the circuit court were not bad lawyers, but they just weren't quite prophetic enough to see that the Supreme Court was going to announce a new rule when it heard these cases?

Mr. FINE. I agree with you, sir.

Senator ERVIN. In other words, if that is the criterion, what we need are not lawyers but we need prophets.

Thank you very much.

Senator MCCLELLAN. Senator Bayh.

Senator BAYH. I have no questions.

I appreciate the witness appearing.

Senator MCCLELLAN. Senator Cook.

Senator COOK. Mr. Fine, in the *Thomason* versus *A. & P.* case you discussed that was a slip and fall case and it was a reversal of the lower court?

Mr. FINE. Yes, sir: it was.

Senator COOK. In regard to this entire field of law do you consider this within the bound of classification as rather a liberal opinion?

Mr. FINE. I would think so: yes, sir.

Senator COOK. How many labor cases do you think, just offhand, that you may have argued before the fourth circuit?

Mr. FINE. I have argued most of my cases before the Supreme Court of Appeals of Virginia. I have represented the CIO, the Teamsters, I have represented the American Federation of Labor.

Senator COOK. In a number of these cases that you have argued, and I hope successfully, did you use any precedents established by the fourth circuit?

Mr. FINE. I am not able to state with any real certainty on that, Senator. I would like to say so, of course.

Senator COOK. Well, Mr. Fine, the real question I am getting around to is do you consider Judge Haynsworth's position on the fourth circuit has been antilabor?

Mr. FINE. No, not one iota, sir. If I thought he was antilabor I would not be here. I have all my life been prolabor and I am sure he has not bias or prejudice, he has none in his makeup both as a man nor is he anti-Negro. I have personally represented a Negro down at home who was charged with raping six white women, and we had it on the radio and very fortunately all collapsed, absolutely untrue. So I also have taken, and taken charge of trying to represent the underdog. And I am glad to do it and will continue to do it.

Senator COOK. Mr. Fine, as a lawyer, do you feel that it is fair to accuse the Judge of being antilabor based upon ten decisions that came to the Supreme Court from his circuit rather than all of the labor cases which came from his court?

Mr. FINE. I think it is manifestly very unfair, Senator Cook.

Senator COOK. Thank you, sir. Thank you very much.

Senator ERVIN. Just one other question. I always loved the expression that Edmund Burke, who was a great lawyer as well as a great statesman, used in laying down the high standards for a judge. That statement was whether the judicial officer could try a case with the cold neutrality of the impartial judge. Is it your opinion that Judge Haynsworth as a judge comes up to that standard?

Mr. FINE. In the most excellent superlative manner, sir.

Senator ERVIN. Thank you, sir.

Senator MCCLELLAN. Thank you very kindly.

If there are no other questions the committee will stand in recess until 10:30 next Tuesday morning.

(Whereupon, at 12:30 p.m. the committee adjourned to reconvene at 10:30 a.m., Tuesday, September 23, 1969.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

TUESDAY, SEPTEMBER 23, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:45 a.m., in room 2228, New Senate Office Building, Senator James O. Eastland, (chairman) presiding.

Present: Senators Eastland, McClellan, Ervin, Dodd, Hart, Bayh, Burdick, Tydings, Byrd of West Virginia, Hruska, Fong, Thurmond, Cook, Mathias and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

The CHAIRMAN. Senator Fong.

Senator FONG. Mr. Chairman and members of the committee, I would like to ask your indulgence for just a few minutes. McGraw-Hill, book publishers and educational film producers, have asked me if I would not consent to have a documentary film of my life taken. Six films will be made. Five have already been produced, the other five being the lives of Albert Einstein, Enrico Fermi, Jonas Salk, Helen Keller and Robert Perry. How I ever got into this very distinguished company I do not know.

They have directed Project 7 of Los Angeles to come to Hawaii to take films of my childhood. They have been to Hawaii and now they are here to take a few scenes of me before this committee. These films will be shown in the schools of our Nation directed to the fourth to the ninth grades, and I am very happy to accommodate them, so I have a cameraman here this morning to film a portion of this hearing.

Judge Winter, I have not met you before. I welcome you before this committee.

Judge WINTER. Thank you very much, Senator.

Senator FONG. This is a silent film. There will be no sound. They expect me to gesticulate and to point. So if you do not mind, I will do just little pointing.

Judge WINTER. I will try to answer your every question, Senator. [Laughter.]

Senator FONG. I am happy to have a distinguished judge like you to be with me on candid camera, and I know the schoolchildren of our Nation will be very delighted to see you.

Judge WINTER. Thank you, sir.

Senator FONG. I welcome you to this committee, and I think you can be very helpful to this committee in our deliberations. I want to thank you.

Judge WINTER. Thank you very much.

Senator FONG. Thank you, Mr. Chairman, I am through.

Senator MATHIAS. Mr. Chairman, would the gentleman yield?

Senator FONG. I will be happy to yield.

Senator MATHIAS. Judge Winter and I are Marylanders and I take this opportunity to particularly welcome him to the committee, but we have a very large program in Maryland for the education of the deaf. We are acutely aware of the presence of lipreaders in our audiences and I am wondering what you are going to do about them in Hawaii.

[Laughter.] Senator FONG. I am afraid the camera will not be able to record it.

The CHAIRMAN. Judge Winter.

TESTIMONY OF HON. HARRISON L. WINTER, JUDGE OF THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

The CHAIRMAN. Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Judge WINTER. I do, sir.

The CHAIRMAN. Identify yourself for the record, Judge.

Judge WINTER. Thank you, Senator.

Judge WINTER. May I be seated, sir, or would you prefer me to remain standing?

The CHAIRMAN. You may be seated.

Judge WINTER. Senator Eastland, my name is Harrison L. Winter. I am from Baltimore, Md. I am presently one of the judges on the U.S. Court of Appeals for the Fourth Circuit.

The CHAIRMAN. Before you became a member of the court of appeals, what other position had you held?

Judge WINTER. In the Federal Government, sir, I was appointed a U.S. district judge for the district of Maryland in 1961. I was appointed to the court of appeals in 1966.

The CHAIRMAN. I take it you are a Democrat?

Judge WINTER. I am, sir.

The CHAIRMAN. I understand you have a statement you would like to present?

Judge WINTER. I do, sir. I am here primarily to answer any question that you or the members of the committee would like to address to me, particularly about the *Brunswick* case, which has been referred to in these proceedings. But to begin, I would like to say that I have known Judge Haynsworth since he was appointed to the U.S. court of appeals, and I have had very close association with him since I was appointed a district judge in 1961, and even closer association since I was appointed to the court of appeals in 1966.

I think that I have had ample opportunity to observe the manner in which he conducts himself, the manner in which he has led his court, and the quality and content of his written opinions.

To summarize my views, I would say that I know of no fairer judge, no more gracious, considerate or understanding leader, and no judicial officer more possessed of judicial temperament.

Judge Haynsworth and I have differed on the decision of cases. At times I have sought to give decisions of the Supreme Court wider scope and wider application than he has. At times the converse has been true. And at times he and I have found ourselves in disagreement with our brethren on the Court, so that we were in a dissenting position. But I must say, sir, and gentlemen, that when he and I have disagreed between ourselves, I have never felt or thought that his position on a particular matter has exceeded the area of legitimate and informed debate.

From my association with him, I have a profound respect for his capabilities as a legal scholar and as an intelligent, capable and informed judge.

Sir, if I may I would offer myself to answer any questions about the *Brunswick* case or any matter about which the committee——

The CHAIRMAN. All right, tell us what you know about the *Brunswick* case.

Judge WINTER. The *Brunswick* case, sir, was argued in Richmond on November 10, 1967. In reviewing my papers last night, I find that it was not until about a day or two prior to the argument that I was scheduled that I was assigned to the case.

The assignment came about because of the fact that in a case to which I had been assigned, I discovered that as a district judge, I had entered certain preliminary orders, and while technically I did not think I was disqualified from sitting, I felt that counsel would be a lot happier if they did not have me.

The net result was that Judge Craven, who is a member of the Court of Appeals from North Carolina, and I changed places and I sat together with Judge Haynsworth and with Judge Woodrow Wilson Jones, the district judge sitting by designation on this case.

The case was argued as I say on November 10, 1967. It was the last case on that day, and immediately after argument——

The CHAIRMAN. What was involved?

Judge WINTER. The case, sir, was basically a dispute between two lienors over a bowling alley enterprise which had not been financially successful.

Brunswick Corp., which had furnished the pinsetting equipment and the other equipment in the alley under conditional contracts of sale and chattel mortgages, was seeking to repossess its equipment in satisfaction of the unpaid debt.

The landlord, the Floyd Corp., which had a bill for unpaid rent and which had a long-term lease that had quite a number of years to run, entered into the proceedings and the essential dispute was whether Brunswick's lien was to be subject to all or part of the landlord's lien.

Brunswick admitted that the landlord was entitled to be paid for rent which had accrued to date, but the landlord was taking the position that not only did it have the right to recover the rent which had accrued to date, but it also has the right to recover all of the future rent which would be earned under this lease, had the lease run for the full term.

The CHAIRMAN. But the property at issue was some secondhand bowling equipment; is that correct?

Judge WINTER. Yes, sir; I think that is true.

The CHAIRMAN. Now proceed.

Judge WINTER. As I say, the case was the third case argued and the last case on November 10, and in accordance with our practice, the panel immediately went into conference to decide on the case.

I made a memorandum subsequently of our conference notes, and from it and my own recollection I well remember that this was not a case in which there was any dispute whatsoever among the members of the panel as to its outcome. We were unanimously of the opinion that the district judge should be affirmed.

We gave some serious consideration to affirming, by handing down an order to that effect that date, affirming on the basis of his opinion, but perhaps unfortuantely, in the light of hindsight, we thought we could express the legal principle in the case a little better so we concluded to write our own opinion rather than to use his.

In due course, I would say about a week later, the assignment of opinions was made, and the opinion in this case was assigned to me for preparation. I undertook to write the opinion, and according to my file on the 27th of December 1967, I circulated an opinion to Judge Haynsworth and to Judge Jones, and of course in accordance with our practice to all of the other nonsitting judges on our court, since we consider that they have a right to offer comments on a proposed opinion as well as those who participated in the case.

Judge Jones responded by letter dated December 29, and concurred in the opinion as it was submitted. He went back to Richmond for a term of court the first full week of January 1968, and the early part of that week, I cannot fix the precise date, Judge Haynsworth told me that he had examined the opinion. He had one of his law clerks examine it also. And his law clerk thought that there was some inaccuracies in the language which I had used in the opinion, in describing the South Carolina action of claim and delivery.

I might say, sir, that in Maryland there is no similar action of which I am aware, and I had never run across this before, and on a matter of purely local law, it would certainly not be beyond the realm of possibility that I would have characterized it in a manner in which inadvertently might have upset local lawyers and local judges.

In any event, Judge Haynsworth—I expressed interest in examining the memorandum and he gave it to me. Then later that week, and I do have a letter from him to this effect, which he wrote in Richmond, on January 9, 1968. He also handed me back the opinion endorsed with his concurrence, in the form in which it had been originally issued, so that I understood that his concurrence was not in any sense conditioned upon my making the opinion.

In any event, after further study of the memorandum, after I returned to my home office in Baltimore following the conclusion of the term of court, I concluded to make some minor language changes in two pages of the opinion. These I mailed out under date of January 19.

I received acknowledgements from all of the judges on the courts, specifically on January—by letter dated January 24, Judge Haynsworth thanked me for revising these two pages, and said the revisions seemed to him to be entirely accurate and appropriate.

By letter dated January 26, Judge Jones agreed to the revised pages, and authorized their substitution in the copy of the opinion on which

he had endorsed his concurrence. By the time I heard from Judge Jones, I had also received acknowledgements from other judges on the court, and so on the same date, January 26, I mailed the opinion and the copies, and returned the record and the tape of argument to the clerk.

Senator ERVIN. Mr. Chairman, may I inject myself. Having been a member of the appellate court I am interested in how the Circuit Court of Appeals for the Fourth Circuit operates.

Judge WINTER. Certainly, Senator.

Senator ERVIN. When you have a hearing by a panel and the panel makes a decision, do you circulate the opinion among the judges of the court who did not sit with the panel?

Judge WINTER. We do, sir. We welcome their comments as lawyers and judges, and in addition to which we think that this is a desirable practice, because it forestalls the possibility of different panels of the court deciding substantially the same or similar questions in different ways.

Senator ERVIN. I think that is a very wise procedure to follow, and I was just curious about what happened in Courts of Appeals generally on that point, because I have seen some cases where on panel decides one way and then the court en banc reverses the panel.

Judge WINTER. Yes, sir.

Senator ERVIN. That practice would prevent that or at least minimize to the lowest degree the possibility of that happening in the fourth circuit?

Judge WINTER. I would say minimize. I am not sure that it prevents it in all cases, sir, but it certainly holds down the number in which it can otherwise happen.

The CHAIRMAN. When did you mail copies of the opinions of the judges who did not——

Judge WINTER. The initial opinion went out to all judges simultaneously, including the two sitting judges on December 27, 1967. The acknowledgments trickled in over a period of some days thereafter. This opinion did not generate any substantial, any comment really from any of the other judges.

The CHAIRMAN. If any judge disagreed with you, what would he normally do?

Judge WINTER. He would write a letter and tell us in what respect he disagreed, and we might then carry on a letter debate as to wheeler his point was well taken or whether it was not well taken.

It is conceivable that the opinion could be changed in some respects by reason of the comments of the nonsitting judge.

Senator ERVIN. Yes; what you are saying is that as a matter of fact the entire court agreed with the decision?

Judge WINTER. Certainly tacitly. There was no express disagreement. There was one judge who did express himself as being in complete agreement. The others simply acknowledged the opinions, which mean under our practice to us that they evidenced no disagreement with what is decided or the manner in which it is expressed.

Well, to go back, first, if I may, I mailed the opinion to the clerk for filing and an announcement on January 26. The clerk would not ordinarily announce the opinion until the judgment in the case was

signed, and in those days the judges themselves signed the judgment, so a judgment was prepared and sent to me as the author of the opinion.

I signed the judgment and mailed it to the clerk in Richmond on February 1, according to the acknowledgment from the chief deputy clerk, she announced the opinion and advised counsel the next day.

That, sir, briefly is the chronology of the actual decision and the filing of the opinion in the case. There were, of course, some post-argument motions.

Senator ERVIN. Judge, how many members were there on the Court of Appeals for the Fifth Circuit at the time these events occurred?

Judge WINTER. You mean the Fourth Circuit?

Senator ERVIN. I mean the Fourth Circuit.

Judge WINTER. There were seven members, sir. At the November session of the court at which this case was heard we had several district judges sitting with us by designation, so that during that week the court operated in three panels sitting simultaneously.

Senator ERVIN. All seven judges either expressly or tacitly approved of your decision in the *Brunswick Corp.* case?

Judge WINTER. I would accept that statement as correct, sir.

Senator ERVIN. Before that Judge Robert W. Hemphill, one of the district judges of South Carolina had tried the case originally and he had reached the same conclusion that the court of appeals reached, and the court of appeals affirmed his judgment?

Judge WINTER. That is right, sir.

Senator ERVIN. And then there was an application made to the Supreme Court of the United States for a writ of certiorari to review your judgment and the Supreme Court of the United States denied the writ?

Judge WINTER. That is a correct statement, sir.

Senator ERVIN. Now, this controversy was between the Florida corporation which was the landlord, and Brunswick Corp. which was the——

Judge WINTER. The conditional seller.

Senator ERVIN. Of the property in dispute?

Judge WINTER. Yes, sir.

Senator ERVIN. Which consisted of certain bowling alleys and pins largely?

Judge WINTER. That is correct, sir.

Senator ERVIN. And these bowling alleys and pins had been in use for several years prior to this controversy, had they not?

Judge WINTER. Yes, they had.

Senator ERVIN. And the question was under South Carolina law——

Judge WINTER. Indeed I believe the record, Senator Ervin, indicated that these pins and bowling alleys had been recaptured by Brunswick as a result of a previous foreclosure.

Senator ERVIN. Under South Carolina law, a conditional seller who is equivalent to a chattel mortgagee, and a landlord both have a lien on property under certain circumstances like this?

Judge WINTER. That is right, and this case was a question of the priority of the liens.

Senator ERVIN. In other words, it was just a question between the landlord and the conditional seller, and Judge Hemphill had held on the trial that the landlord had a prior lien for the past due rent, that is for the rent which had accrued during the time that the purchaser of this equipment had actually been occupying his property, but that the conditional seller had the priority of lien as to the property subsequent to that time, or what was left of the assets representing the property.

Judge WINTERS. That is what he had to decide, Senator Ervin.

Senator ERVIN. In other words, the thing as I understand it, is very succinctly summarized in the first paragraph of your opinion which appears at 392 Federal Reporter Second Series on page 338 where you say this:

> The primary issue which we are called upon to decide in this case is the extent under South Carolina law as applied to the particular lease agreement in question of the priority of a landlord's claim for rent over the claim of a chattel mortgagee to mortgage property placed upon the leased premises. The district court ruled against the contention of the landlord that it was entitled to recover the total amount of rent due under the term of the lease, that the landlord's claim had priority only to the extent that it was for rent unpaid during the period which tenant had actually occupied the premises. Reaffirmed.

That is a succinct statement of what the decision was.

Judge WINTER. I will not deny authorship, sir, and I think it is accurate.

Senator ERVIN. There is no doubt about it. I would like to submit a copy of the opinion for the record at this point.

(The opinion appears in the appendix.)

Senator ERVIN. One further question. As I infer from the statement you made at the outset of your testimony, nothing which has been revealed in connection with the acquisition of the Brunswick stock by Judge Haynsworth has impaired to any degree your confidence in his integrity, in his legal ability, and in his judicial temperament?

Judge WINTER. Not in the slightest respect, sir.

The CHAIRMAN. Senator Hart?

Senator HART. Mr. Chairman.

Judge, the Department of Justice wrote the chairman of the Judiciary Committee, Senator Eastland, a letter, a copy of which I read in the Sunday paper. In that letter, discussing the Brunswick stock purchase by Judge Haynsworth, I note that the statement is made that on November 10, immediately following the oral argument, the panel met in conference to decide the case. The letter goes on to say that at that time, that afternoon of November 10, you, the panel, unanimously voted to affirm the judgment. Is that correct?

Judge WINTER. That is a correct statement, sir.

Senator HART. Now, would you regard it as proper on your part to have purchased the Brunswick Corp. stock before the release of the opinion?

Judge WINTER. Before the release of the opinion? I think, sir, if I had been in that situation, I would have avoided buying the stock until after the opinion had been filed and the matter had been disposed of. I do not think, however, that I would have been legally disqualified, since a decision had been reached in the case in my mind, since the nature of the decision was not one which could have affected the value of the stock one way or the other.

I do not think I would have been legally disqualified from doing it. But I think that had I been fully conscious of this case, I certainly would have avoided buying the stock.

Senator HART. Thank you very much.

The CHAIRMAN. Senator Bayh?

Senator BAYH. Thank you, Mr. Chairman.

Judge Winter, I appreciate your candor. I want to say at the outset I intend when Judge Haynsworth comes before us to apologize publicly, for whatever good that may do at this time, for bringing out the Brunswick matter before we had a chance to ask him personally. Because of the change of witnesses I wanted to get the opinion of the man who is a recognized scholar. Since the matter has been brought out it has been highly publicized and we appreciate your adding your expert testimony on how it was handled.

In the eyes of some I suppose I am the villain. The question is whether I am the hatchetman on this case. I do not like to be placed in that role, but I think we have a responsibility on this committee to ferret out some of these facts.

As I see it, your very forthright assessment of the judge's capabilities, his manner, the way he conducted his court, his courtly manner, his judicial temperament I think you mentioned, his integrity and his confidence, I think these are value judgments which we take into consideration when we are passing on any judicial nomination.

But it seems to me we also in addition to that have to look at whether there have been inadvertent improprieties or a pattern of conduct which was innocently entered into, which may bring suspicion to the court. It is for that reason that I have been pursuing some of these questions, although without a great deal of pleasure.

You mentioned, Judge Winter, that the court could have affirmed the decision outright, without this delay, is that correct?

Judge WINTER. Yes, that is correct.

Senator BAYH. I do not want to put words in your mouth, but as I recall, you said you thought the court could write a decision which better defined the judicial principles involved than that which had been handed down by the lower court?

Judge WINTER. We were of that view.

Senator BAYH. I think you clarified this by suggesting that there had been a sequence of events in which the various judges had a chance to review the opinion, and thus it was not finalized on that November 10 date?

Judge WINTER. No, it was not, sir.

Senator BAYH. I might ask you this, and I do not want to put you in an embarrassing position, but when is a case finally decided? I have never had the privilege of sitting on the bench. I am sure that all circuits do not act in the same way. They have different patterns.

I have conversed in confidence with two other appellate court judges, who have related the experiences in their circuits, in which one judge specifically mentioned two cases that he was asked to write, where on reviewing the record, what had been said on appeal as well as what had not been said on appeal, he changed his opinion and dissented. and in one of these opinions the entire court changed its position after the oral argument, after the original agreement by the judges.

Is that an unusual thing to have happened? Has that ever happened in the fourth circuit?

Judge WINTER. These are always possibilities. It has happened in the fourth circuit, Senator. I think it may be fairly stated that a case is never decided finally or never put to rest until an opinion has been filed, all postopinion motions have been denied, and the Supreme Court of the United States has denied certiorari, but I am constrained to say that in this case these possibilities in my view were much more theoretical than real.

Senator BAYH. I willingly accept your judgment on that, from everything I have read and heard you are an expert in this area. I am willing to accept that. I am looking at the matter of what sort of standard we are going to set to absolve ourselves and the judiciary and the Government of any question of impropriety, any appearance of something that might be less than the right type of standard.

You mentioned that there were postdecision arguments. Would you tell the committee, please, what kind they were, when they were made, who participated in the final determination that they would be, I suppose, rejected under this particular case?

Judge WINTER. Certainly. At the time that this case was decided, the practice in our court was to have our opinions formally printed. See this, sir? It is a little slip copy of the opinion, somewhat like the ones the Supreme Court also puts out. We were having a great deal of difficulty with the printer. He was delayed in getting proof out. He was delayed in making a final run after a judge or his office had proofread the galleys on his opinion, and the fact of the matter is that copies were not furnished to counsel who participated in the case nearly as early as we would have liked. We have since departed from the practice of formal printing to meet this objection, and we now use a photo-offset process where it can be done in a matter of days.

In any event, to complete the chronology of the case, let me find you some specific dates.

On March 12, 1968—please bear in mind, sir, that after a judgment has been filed in a case of this nature, parties under the rules have a period of 30 days in which to ask the court to reconsider its opinion or its decision. On March 12, 1968, there was filed a petition to extend the time for filing a petition for rehearing.

To summarize its allegations, it was, in effect, that counsel felt that the 30-day period in which to petition for a reexamination of what was decided ought not to be considered as having run against them until they had a copy of the opinion furnished them by the clerk, and they said that one had not been furnished them until February 27, 1968.

A copy of this petition was circulated to the judges who sat on the panel; that is to say, Judge Haynsworth, to me, and to Judge Jones. I received it on the 20th, and under our practice I as the author of the opinion would ordinarily be the moving party in recommending what sort of action ought to be taken on the petition.

I read it and I communicated with Judge Haynsworth and told him that I thought the petition should be denied. He confirmed this to me, and said he agreed. He said he had also talked to the clerk's office, and he had found that although copies of the opinion could be ordered from the clerk's office, that is a Xeroxed copy if somebody wanted it in a

hurry, and of course the opinion was on file and was open to inspection by anybody who wanted to walk into the office and look at it, that no effort had been made here to extend, I mean to get a copy or to examine it, in addition to which the counsel had advised the clerk that even if we extended the time in which to file this petition, he was not really sure that he wanted to file a petition for reconsideration, and so he said that he would accept my recommendation that this petition be denied.

I tried to get in touch with Judge Jones, but Judge Jones sits in a district in which he must hold court in several places, and my recollection is that at that time, Asheville is his home station, that he was holding court, I think it is Asheville, in any event he was holding court in Charlotte.

He did not have his papers there. He was on the bench. So after trying to reach him, I prepared an order denying the petition for an extension of time in which to file a petition for rehearing.

At this time we were in the transitional stage of another change in practice. Ordinarily orders of this type would be signed by judges who sat in the particular matter but we wasted so much time circulating orders that we finally concluded if we were in agreement why one judge could sign on behalf of the whole panel.

The practice, however, was new and I was a little bit reluctant to sign myself particularly when I had been sitting with the chief judge as to whether I was robbing him of one of his prerogatives, so I transmitted the order and a covering letter to Judge Haynsworth, and Judge Haynsworth signed the order and forwarded it to the clerk. Of course, copies of this order were sent to everybody, and in the meantime Judge Jones had expressed himself as being in accord with the order.

Senator Bayh. What was the date of that final disposition then, Judge Winter?

Judge Winter. Just a minute. I have a copy of Judge Haynsworth's transmittal letter to the clerk. It was mailed to the clerk on March 26, 1968. I assume it would be received and entered the next day.

Senator Tydings. That is a denial of the order for a rehearing?

Judge Winter. It was a denial of a petition for an extension of time in which to file a petition for a rehearing, Senator Tydings.

Senator Tydings. But in effect it was a denial of a rehearing?

Judge Winter. Well, no; because there was nothing before us on what the merits of the rehearing was, except to say we do not like what you have decided. I mean you could infer that.

Senator Tydings. Is there any other way that the matter could have been brought up before the court of appeals again after that order was denied?

Judge Winter. Well, this petition could have spelled out the reasons why they thought the decision was wrong, if there were any factual errors in it or false premises, but it did not undertake to do so. However, there was another one which came along sometime in April, April 3 and April 4, a petition and a supplemental petition to reconsider the petition to extend the time for filing a petition for rehearing, a very complicated title. In any event, this did suggest, it not only asked us to reconsider our prior refusal to permit such a document to be filed, but it also suggested some reasons as to why the opinion was thought to be wrong.

This apparently got misplaced. The clerk sent the only copy to Judge Haynsworth, and I did not know anything about it until I heard from Judge Haynsworth in August of 1968, in which he told me the matter had been misplaced. He commented on what he thought was the lack of meritorious basis for a rehearing, and he had prepared and enclosed an order which he had signed, but which provided for the signature by me and Judge Jones denying the petition not only on procedural grounds, but also on the merits.

We did not think there was any merit in the argument as to why our opinion should be changed.

This I think arrived in my office while I was away at school at New York University, and I did not get back to Baltimore until later in the month, but in any event on August 20, after examining the papers and Judge Haynsworth letter, I signed the order and forwarded it to Judge Jones, and I have a copy of a letter which shows that on August 24, Judge Jones had signed it and sent it to the clerk, and an acknowledgement from the clerk on August 26 that he filed this last order, and had mailed copies to counsel.

I believe I am correct that in the interim period, while our action on this motion was pending, an application had been made to the Supreme Court for a writ of certiorari. I am not sure, however, of the exact date that that was denied. I could find it, however. It is a matter of public record.

Senator BAYH. Thank you. I appreciate your bringing out the dates involved, and I think the record should show that this is in all fairness probably a bit longer than it would normally have taken if it had not been for the papers being lost, although the final decision in your court was not made until August 26, that it would not normally have been that long if everything had moved along according to——

Judge WINTER. Well, Senator, if I may impose a legal concept, I would say that our decision was certainly arrived at on the date that I have previously testified to. So far as the parties were concerned, it was known to have been decided on February 2. Thereafter I suppose the burden of upsetting it or getting a change would rest with them.

In other words, it would be final unless and until they could convince us that we ought to change it.

Senator BAYH. Correct, but you had not foreclosed the opportunity of opening the case again?

Judge WINTER. No. Under the rules the parties have another crack at it for 30 days.

Senator BAYH. Thank you.

Now the discussion which you and our distinguished colleague from North Carolina participated in relative to the merits of the case I think pretty well points out what indeed was decided in that case as far as the litigants are concerned. So much to the question of Brunswick, it decided what was going to happen to that Brunswick property in that case. It is also fair to say that if any similar suit had been brought involving a bowling lane's operator and Brunswick in any other city or town or village or hamlet in South Carolina, that that case would have served as precedent?

Judge WINTER. Yes, it would have.

Senator BAYH. Is it also——

Judge WINTER. I would assume. Now let me say this, however. I have to interject this, because of some experiences I have had.

Senator BAYH. Please feel free.

Judge WINTER. Some experiences I have had as a practicing lawyer before the Maryland Court of Appeals. Under the so-called Erie rule, that is the Supreme Court decision in *Erie Railroad* v. *Thompson* a Federal court sitting in this type exercising its diversity jurisdiction is bound to apply the State law which is applicable. Now many times we are in a position of having to make an informed prediction or informed guess of what the State law is, because you cannot find a decision of the highest court of the State which is pat for the factual situation that you are presented with.

You do the best you can with it. Maybe you have to extend the State law a little bit in the process. It is not inconceivable that if a second foreclosure case involving Brunswick or any other seller of bowling alley equipment had been filed in a State court, that the courts of South Carolina, when faced with this same situation, might have arrived at a different result.

What I am saying to you is that in the case of this type, the decisions of the South Carolina courts are binding on the Federal courts, but the decisions of the Federal courts are not binding on the South Carolina courts on matters of State law.

Senator BAYH. I understand that. I was just trying to point out the fact that the reason it is important for us to go as far as we can to prevent these impressions of impropriety, inadvertent as they may be, is that a decision when it is handed down does have an impact outside of that individual case.

Judge WINTER. Well, it would certainly have, I would think, weighty precedental value.

Senator BAYH. I do not want to argue that this is a landmark case in bowling alleys.

Judge WINTER. It is not, sir.

Senator BAYH. But I think if you look at the history of the past few years in bowling alleys, whether it is Brunswick or AMF, they have gotten themselves rather extended, so this has been a common problem of how you repossess property that you have a mortgage on. This problem not only arises in South Carolina, it arises in the fourth circuit and it has been arising all over the country I realize the State law is applicable, and it would only apply in your circuit outside of South Carolina if indeed there was similar State law. But I do not want to make a cardinal principle out of this.

Now, could you tell us, please, about this policy of review? I think Senator Ervin brought this out. You circulate the court decisions to all seven judges in addition to those sitting on the panel?

Judge WINTER. Well, presumably there would be two or three sitting on the panel, and then the others also get copies of the opinions.

Senator BAYH. All of them? Well, you point out some do and some do not comment and make positive contributions.

Judge WINTER. Before filing an opinion, we wait to get an acknowledgement at least from every other judge, except in an extraordinary case, where time is really of the essence, if a person's rights are to be

protected, but even then it is not unusual for us to call up a judge and say, "I have not heard from you. Are you going to give me any comments or how do you feel about it?"

Senator BAYH. Did I understand you to say that on occasion judges not sitting on the panel—that their opinion does indeed affect the thoughts of the other judges?

Judge WINTER. That is entirely possible; yes, sir.

Senator BAYH. Do you release the remarks, these solicited opinions? Are they recorded so that there is a record of them?

Judge WINTER. Well we carry on—there must be incorporated in the correspondence between us. If, for example, I am a judge who does not sit on a panel, and an opinion is circulated, and I have some comment of substance that I want to make, I would write to the members of the panel, and indeed send copies to all the other members on the court, so that they are fully advised on what is the state of the letter debate at the moment, shall I say.

Senator BAYH. The reason I asked this is that I want to ask Judge Haynsworth, and I see he is sitting here so he will I am sure be prepared even without advance notice. Looking at these canons of ethics I have been of the opinion that if you have stock which you know is going to be involved in litigation you ought to get rid of it, and some of the stock in question that I have talked to the distinguished judge about is the J. P. Stevens stock in which he said he disqualified himself from sitting, and I would like to have his opinion relative to whether he also gave an informal opinion on this. That is why I think just to be absolutely certain, we had better get rid of this type of stock, even though he has made it very clear that for other reasons than ownership of the stock he is not going to sit on the *J. P. Stevens* cases.

I am going to ask you whether he has offered an informal opinion on this, but I do want to ask him when he comes before us.

Have any of the judges in the fourth circuit made disclosure to each other about their particular stock portfolio or their holdings?

Judge WINTER. Not generally. I would say only where a judge may have concluded that he ought not to sit in a particular case, and sometimes informally he will say to his fellow judges, "I am going to remove myself from this case because of stock ownership" or for any of the other myriad of reasons that a judge may disqualify himself for.

Senator BAYH. I salute you for your pointing out that there have been cases in which you technically may not have been disqualified under the canons, but that you have nevertheless disqualified yourself. Let me ask you one question, since I hope we can come up with some general ground rules to avoid this type of thing in the future.

Do you feel that the judicial canons of ethics are appropriate for our consideration as far as what is and what is not proper judicial conduct? Is this something that a judge should take into consideration when he determines whether he sits on a case or not?

Judge WINTER. Oh, very much so.

Senator BAYH. Let me refer specifically to canons 29 and 26 that deal with a financial interest.

Judge WINTER. Well, my own feeling about——

Senator BAYH. Senator Tydings suggested I read these. I know you are familiar with them but let me read them very quickly.

26. A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court.

I do not think I really need to go ahead and read the rest of that. It substantiates that.

29. A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is a judge he need not resign his judgeship on that account but he should of course refrain from any judicial act in such controversy.

Judge WINTER. Well, to answer your question, Senator, I would say I think that any judge ought to consider carefully not only in connection with sitting in a case but also the whole conduct of his life and the conduct of his office, in the canons of judicial ethics.

I must confess that to me the answer is not so clear, so open and shut as to whether a judge ought to sit or ought not to sit in a case in which he owns a share of stock.

Now, I realize that under the canons as they have been interpreted, particularly one formal opinion is some 30 years old, the American Bar Association Committee at least has taken the position that if you own any stock, that is it. You ought not to sit at all.

Senator BAYH. May I quote for the record the ABA opinion 170 that I think you are alluding to.

Judge WINTER. That is the one I am referring to.

Senator BAYH. It says:

"A judge shall perform no discretionary act in a case where he owns a stock" or any part.

Judge WINTER. That is right. Maybe that is the correct rule. I am not sure that the answer is really quite that simple.. I do not know, for example, on some American corporations where there are millions of shares outstanding, and a judge has a very small holding, where the result of the litigation one way or the other could not be measured on his ownership in mills—let us assume he were writing new rules I am talking about, whether he should be obliged under those circumstances to be completely disqualified or whether he should not. Maybe the answer is to protect the confidence of the public you throw the ball too far one way and keep him all off, but you avoid any possible criticism.

On the other hand, I must confess I have serious doubts that you need to go that far, and if you need to go that far, what do you do, for example, about a stock which may be owned by his wife?

Now, if he furnished her the consideration and she simply is a nominee holding it for him, then I suppose her holdings ought to be considered as well as his. On the other hand, if she inherited money, made money or what have you, and has her own portfolio, and he is not the one who has told her what to buy or what to sell. I just do not know how to deal with it.

Senator BAYH. It is a problem of where you draw the line.

Justice WINTER. It is a supremely gray area. That is really the thesis of what I am trying to say to you, and believe me, I am sympathetic with what you are trying to do 100 percent, but I am the first to say that I do not find it easy to formulate the rules.

Senator BAYH. I do not, either, and I do not suggest for a moment that the $16,000 or the $18,000, whichever price you want to take on this particular Brunswick stock, was of such significance that any man, particularly Judge Haynsworth, would be tempted by the case in question. I just am trying to arrive at some line of demarcation.

Just one last question.

Would it be fair to say that perhaps a judge should disclose to his fellow judges that this would ease the burden?

Senator ERVIN. Will the Senator yield for one observation at this point? I do not guarantee my arithmetic. I never was a great arithmetic scholar but if my arithmetic and the papers are correct Judge Haynsworth owned one 1,000th of the 18 million shares of the Brunswick stock, that his interest in that company amounted to 0.0005 percent.

Senator BAYH. May I ask the Senator a question?

Senator ERVIN. Or one-eighteenth thousandth of an interest.

Senator BAYH. Senator Ervin, let me just suggest I think you are probably correct. Your arithmetic I am certain is correct even if your interpretation of what this means may not be on the mark. But I would suggest that to the average litigant, the average citizen of my State, that that infinitesimally small amount would probably not be what impresses him, but the fact that here we are talking about $16,000 or $17,000, and that is a sizable sum to most of our people, and it is that type of impropriety we are trying to keep away from.

I will not pursue this further. You have been very kind, Judge Winter, in helping us think about this whole problem.

Judge WINTER. Thank you, Senator.

Senator HART. Would the Senator yield just a minute?

Let me attempt to clarify Judge Winter's comment about this being a gray area. The canon which Senator Bayh just read, which I now have in front of me, says:

> A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court.

And it continues to charge that if one goes on the Bench and has such an item, he is to sell it.

Now, this Brunswick stock, this Brunswick company was involved in litigation before this court. You can quarrel with the canon, but is there any gray about that?

Judge WINTER. Senator, when I said gray area, I had reference to the situation where we wipe out the existing status, wipe out the existing canons, and we were trying to formulate a new system. What I am saying——

Senator HART. I thought that is what you had in mind and that is why I wanted to clarify it.

Judge WINTER. Certainly, but what I am saying is this. That the policy consideration behind the canons is not one which, shall I say, has my unqualified acceptance, at least as a philosophical matter or as a policy matter. I still wonder whether this is the way the rule ought to be.

Senator HART. But if it is the rule, what do you do about it?

Judge WINTER. Well, if it is the rule, I think that the canons as a moral force ought to receive very careful consideration, if indeed not exact compliance.

Senator HART. Thank you.

Senator BURDICK. Mr. Chairman, Jndge Winter, you gave us a chronology of what happened in this case from November 10, when they had the oral argument until February 2 when the clerk announced the decision to the public. During this period of time no one but the judges knew what the decision was, what the outcome of the case would be?

Judge WINTER. That is correct, sir. The judges and I presume some of the members of their staffs who had been working on this and could not help but know.

Senator BURDICK. But it is a matter of policy that it is not revealed to the public until the decision is announced?

Judge WINTER. It is not revealed to the public until the clerk announces the judgment and the opinion, and this was done on February 2, sir.

Senator BURDICK. And this is the policy that is followed all through the fourth circuit in all cases?

Judge WINTER. It is the policy of all courts, sir.

Senator BURDICK. Of all courts?

Judge WINTER. And if not it should be.

Senator BURDICK. One of the reasons for the policy, I presume, is that the outcome of a case in litigation might have economic effects, market effects, and other kinds of effects; could it not?

Judge WINTER. Well, there is certainly all of those possibilities, and I daresay if we sat down we could think of some more.

Senator BURDICK. But the point is that this matter did not become public until February 2, 1968?

Judge WINTER. That is the fact.

Senator BURDICK. That is all. Thank you.

The CHAIRMAN. Senator Tydings?

Senator TYDINGS. Mr. Chairman, just for the record and for my colleagues on this committee, Judge Winter is a very distinguished judge, and was a distinguished lawyer in Maryland before he went on the bench. He was city solicitor of Baltimore City for many years, and he is highly thought of by all practicing members of the bar. I think his testimony here aptly demonstrates why we think so highly of him.

I also know that Judge Winter has a great deal of respect and admiration for Judge Haynsworth. I just have a few questions, Judge Winter.

How often since you have been on the fourth circuit has a panel to your knowledge changed its mind after an original opinion was agreed upon?

Judge WINTER. Senator Tydings, it would be hard for me to put an exact figure on it. At the moment I think I could recall about a half-dozen instances in all of the 3 years that I have been there. There may have been more. A half-dozen may be a little too generous. There are enough that I am aware that this is a possibility, and freely admit and recognize that it is a possibility, but it does not happen too often.

Senator TYDINGS. Were there any characteristics of these cases which were uncommon, so that you can make a general comment about them, or not?

Judge WINTER. No.

Senator TYDINGS. How many months generally elapse after the clerk makes the public release of an opinion before the postargument petitions are generally dispensed with or concluded?

Judge WINTER. Well, in civil cases if there is compliance with the rules, these motions would have to be filed within 30 days, and I think it rare that a motion, postargument motion, is not acted upon within a week or 10 days after it is filed.

Senator TYDINGS. Generally speaking, within 2 months at the outside, within 2 months after the opinion is made public by the clerk of the court, insofar as your court is concerned, the case is generally concluded?

Judge WINTER. At the most, and generally a little less than that.

Senator TYDINGS. At the time of the argument in the *Brunswick Co.* case, where there, to your knowledge, any similar cases pending in your circuit?

Judge WINTER. I would either know or be chargeable with knowledge, Senator Tydings, only with reference to those on appeal, and not any which might be pending in the district courts od the circuits. I was not aware of any other cases on appeal involving the same or similar questions.

Senator TYDINGS. In the arguments before your court on this case, was reference made to any similar litigation involving bowling alley cases and chattel mortgages, and was there any reference made to any other cases involving Brunswick as a party litigant?

Judge WINTER. To my recollection, no reference was made, sir. On the other hand, most of us try to be informed of what has been going on. I suppose some of us had general knowledge that, well, the bowling alley business was depressed, overexpanded, and there were a lot of alleys in trouble throughout the country.

Senator TYDINGS. Did the court receive any information in the briefs or the argument on the economic factors present in the bowling industry or the ability of Brunswick as a company or the future economic health of Brunswick Co. or the bowling industry?

Judge WINTER. No, sir; not to my recollection. It seems to me that would have been inappropriate as far as this case was concerned. We had a very narrow legal question, and I think if counsel had sought to argue the economics of the bowling alley industry, we would have been rather sharp in diverting the argument away from that subject.

Senator TYDINGS. Now two final questions, going back to questions propounded by my colleague, Senator Bayh.

With relation to canon 26 and canon 29, actually until we get judicial reform legislation through the Congress, we do not have too much to go by in this so-called gray area, but I am going to refer to canon 29:

> A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved.

Do you feel that Judge Haynsworth was in violation of canon 29 when he purchased the Brunswick stock?

Judge WINTER. The way I would construe canon 29; no.

Senator BAYH. Will the Senator yield?

Senator TYDINGS. Yes.

Senator BAYH. But you did say that under the same circumstances

you yourself would not put yourself in that position of being at all questionable as far as purchasing that stock?

Judge WINTER. Well, that is correct. My answer to this question, my answer to Senator Tydings' question, is I was convinced at the time, and I am firmly convinced in my own mind, that this case was over on November 10, 1967. True the opinion had not been announced. True it could have been modified theoretically up to the moment it was announced. True it could have been modified after it was announced theoretically, and also true that the parties did not know the outcome until February 2. But there was not any question in my mind as to what the decision was that we had reached, and that it was final, in addition to which if what I understand, and believe me I know only from what newspaper publicity has been given these hearings, but from what I understand about Judge Haynsworth's participation in Brunswick, I think that you could make a strong argument that there was not a substantial personal interest involved, that it was a de minimis interest as far as the outcome of this case is concerned.

Senator TYDINGS. Let me direct your attention to canon 26:

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court, and after his ascension to the Bench he should not retain such investment previously made longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should so far as reasonably possible refrain from all relations which would normally tend to arouse the suspicion that such relations would bias his judgment to prevent his impartial attitude of mind in the administration of his judicial duties.

I will ask you the same question. Do you think he was in violation of canon 26 when he made that purchase?

Justice WINTER. I do not.

Senator BAYH. Will the Senator yield for just one question?

Senator TYDINGS. Yes.

Senator BAYH. I will try not to keep interrupting, but if we could structure—if I may pose a hypothetical question, if instead of the chronology of this being an order for stock on December 26 by McCall for 1,000 shares of Brunswick, if instead of that order coming a month and 10 days after the case has been argued, although it went on for quite some time, suppose that stock had actually been owned by the judge or he had sought to purchase it in advance of November 10. Then would he have been in violation of the canons of ethics?

Judge WINTER. Certainly the way the American Bar Association interprets the canons, the answer is yes.

Senator BAYH. At least the closeness of time.

Judge WINTER. The formal opinion 170 that you have referred to before. I do not know, Senator. This is a very difficult subject. It is one—well, there is no point in attempting to write the bill here.

Senator TYDINGS. Did Judge Haynsworth ever discuss with you or any members of the panel during this period that he was about to make a purchase of the Brunswick stock?

Judge WINTER. No; I had no knowledge of it until the matter was brought out before in these hearings.

Senator BAYH. Judge Winter, if you had been made aware that Judge Haynesworth had purchased the stock as he did in the latter part of December, what action, if any, would you and Judge Jones have taken?

Judge WINTER. I think that I would have called the matter to Judge Haynsworth's attention, that this was a case in which the opinion had not been announced, but I think that I would have left the decision of what part he should play in it entirely up to him, because I think matters of personal disqualification are peculiarly a matter for personal decision. Perhaps I am influenced, Senator, by my initial association with law with your friend and my friend, Judge Soper, when I was law clerk for him, but I remember so well one of the adjustment plans of the B. & O. Railroad came before a statutory three-judge court in Baltimore, and he came out to hear the case, and was presiding, and he was followed by another circuit judge as well as, I think, Judge Coleman, or maybe it was Judge Chestnut. I have forgotten. In any event he said to the counsel:

Gentlemen, you may be surprised at the composition of the court this morning because ordinarily I would sit with the two Maryland district judges. One of them, however, has securities in the B & O Railroad and he has disqualified himself. I, too, have securities in the B & O Railroad and I have decided it is not going to affect me. You may go ahead.

Senator BAYH. They would have had the opportunity to challenge his qualifications; would they not?

Judge WINTER. Yes; I presume they could have complained about this on appeal to the Supreme Court.

Senator HART. Just one more interruption but on the same point. You replied to Senator Tydings that you felt that canon 26 was not violated, given these circumstances. Let me read again that opening section of 26:

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court.

There is not any doubt about Brunswick's likelihood of involvement. It was involved. Now how can we flatly conclude that section 26 is not applicable?

Judge WINTER. What I am saying, Senator, is this: I do not think that 26 was violated under the circumstances of this case.

Senator HART. Because there was no likelihood of it being a litigant?

Judge WINTER. No, no, no. If we are going to use likelihood of somebody being a litigant, I suppose anybody can be a litigant, and as a result a judge cannot make any investment. What I am saying, sir——

Senator HART. In this case it was a very current event.

The CHAIRMAN. Let him answer the question.

Judge WINTER. What I am saying, sir, is this: That under the particular facts of this case, and that is my conception that this case was decided on November 10, then I do not think the spirit of this thing was violated at all.

Senator HART. You think that is was not apt to be a litigant since it already had been a litigant?

Judge WINTER. What I am saying was that——

Senator HART. That made it less likely?

Judge WINTER. Its days of a litigant in the eyes of the decisional process were at an end because its rights had been adjudicated.

Senator HART. Thank you.

Senator ERVIN. I would like to ask a question or two on this problem of ethics. The Congress has enacted a law which expresses the

congressional intent as to what disqualifies a judge, and I refer to 28 United States Code 455, which clearly implies that a judge not only has the duty of disqualifying himself on some occasions, but unless he is disqualified he has the duty to sit.

Now this statute says this; and after all, an act of Congress which regulates the conduct of a Federal judge is an act which is binding on the judge, while the canons of judicial ethics of the American Bar Association are something for individual determination. Here is the Federal statute:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render improper in his opinion for him to sit on the trial, appeal or other proceedings therein.

Now certainly the test of disqualification made here as far as ownership of property or anything of that concern is that the judge should disqualify himself in any case in which he has a substantial interest.

Judge WINTER. Or in which—and in which in his opinion——

Senator ERVIN. Yes, in which in his opinion he should disqualify himself.

Judge WINTER. It would be improper for him to sit.

Senator ERVIN. Now certainly this 0.0005 proportionate ownership of the Brunswick Corp. by Judge Haynsworth could not have given him any very substantial interest in the outcome of that case, could it?

Judge WINTER. Sir, I think the arithmetic of it would show that it was not certainly a big interest in the absolute sense, and I would not quarrel. I do not know whether Judge Haynsworth was aware that he had this or whether he had not.

Senator ERVIN. Yes.

Judge WINTER. I have not attempted to talk to him or to find out about it. But let me put it this way. If he concluded that that was not a substantial interest I would not have questioned his judgment for a moment, or if he had concluded that it was a substantial interest, but nevertheless it was not improper for him to sit, I would not have quarreled with him for a moment.

Senator ERVIN. Now, your opinion in this case was not only tacitly or expressly agreed to by the seven circuit judges, but it was also in harmony with the ruling of Judge Hemphill, the trial district judge, and was a ruling concurred in by Judge Woodrow Wilson Jones, who was also a district judge. So you had seven circuit judges and two district judges who agreed either expressly or tacitly that this was a correct opinion. Has any judge or any one of these judges ever raised the slightest question so far as you know that there was anything unsound about the opinion?

Judge WINTER. No, sir.

Senator ERVIN. Now, the question of disqualification is one which normally arises when a judge is assigned to hear the case, is it not?

Judge WINTER. Ordinarily, sir, yes.

Senator ERVIN. That ordinarily arises?

Judge WINTER. Yes, sir.

Senator ERVIN. And you mentioned the fact that under somewhat similar circumstances where Judge Soper had an interest, that he decided he was not disqualified?

Judge WINTER. That is correct.

Senator ERVIN. And Judge Soper was a jurist of the highest character as well as of exceedingly high level attainment, was he not?

Judge WINTER. I respected him tremendously, sir.

Senator ERVIN. With reference to canon 26, "canon 29, a judge shall abstain from performing or taking part in any judicial acts in which his personal interests are involved," isn't the question of where the judge's personal interests are involved a question of degree? It is hard to just say definitely exactly how or what an interest is or to what extent there has to be an interest.

Judge WINTER. It is a little like antitrust law, sir. I think it has got to be read with some rule of reason. If you are going to take it literally, in which his personal interests are involved, I think you could say a judge has got a personal interest in every criminal case, at least a Federal judge in every criminal case prosecuted before him, because he is one of the members of the public on whose behalf the prosecution is carrying on.

What I am saying is this, that I think that there has got to be some degree or at least I would tend to read this with some degree of flexibility. Now I think perhaps I find myself somewhat in disagreement with the formal opinion, and I keep forgetting the number, sir.

Senator BAYH. 70——

Judge WINTER. Yes, which seems to lay down an absolute rule, and I do not question that that is the way that the American Bar Association interprets the canon.

Senator ERVIN. And this canon 26 which provides in part that a judge should abstain from making personal investments in enterprises which are apt, and I digress to say that my dictionary says the word "apt" means "likely", to be involved in litigation. Of course, does that not imply in the first place that he is apt to be involved in some litigation before his court, not that of some other judge? Isn't that implied?

Judge WINTER. Well, I think it generally—I would read it to mean to him, before him.

Senator ERVIN. Yes.

Judge WINTER. I mean a typical example of this, at least in my estimation, is if you are a district judge, you do what I did, and that is sell stock in Casualty Insurers, because you cannot tell who is defending, who is the insurer behind the defender or who is not, and you refrain from going out and buying any other stock in Casualty Insurers.

Senator ERVIN. Now, I would say not only a judge should abstain from buying interest in a business that is likely to be involved in litigation, but I would say just as a layman he would be a plumb fool if he would buy stock in an organization that is going to be involved in litigation.

Judge WINTER. Except with casualty companies, litigation is a part of their business.

The CHAIRMAN. Senator Hruska?

Senator HRUSKA. You indicated that there were perhaps as many as six cases that you recall in which motions or petitions for rehearing had been granted in your 3 years of experience?

Judge WINTER. Senator, I thought I was referring to cases where as a result of discussion among the court after argument, a proposed decision or a tentative decision was altered.

Senator HRUSKA. I see. Would you tell us what the caseload is or has been these last 3 years per year? Could you estimate it?

Judge WINTER. Well, it has been, including cases involving State prisoners, that is our habeas corpus litigation, which is substantial, I think we are now reaching the neighborhood of about 1,000 filings a year, a thousand cases a year, I am not sure that we have been able to keep up with that load. Our backlog may have built up somewhat. But I am not the best one to ask about this, sir. Ordinarily the chief judge of a court is more acutely aware and more familiar with the statistics than an associate judge on the court, and while I have received it, I do not retain the figures.

Senator HRUSKA. It is on the order of a thousand. I just wanted the range. I do not imagine the exact figure is too material. But the figure that you did give, would that include the prisoners' cases?

Judge WINTER. Yes. It would be about 300 prisoners, 200 to 300, or 300 to 400 prisoners' cases in that. We are dealing in big numbers. We are dealing in heavy workloads.

Senator HRUSKA. Thank you very much.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Thank you, Mr. Chairman.

Judge Winter, I have only one question. and I think this is the question that the members of the Judiciary Committee would wish answered, and that the Senate would wish answered. Do you feel that the purchase of stock by Judge Haynsworth in the Brunswick Co. under the circumstances he purchased it should or should not disqualify him from becoming a member of the Supreme Court of the United States?

Judge WINTER. Senator, I think it is a very healthy thing that all of the facts and circumstances are being aired, but as I undertsand the facts and circumstances, I do not consider that this is the slightest disqualification for favorable action on his nomination, if this committee and the Senate are otherwise disposed to take such action.

Senator THURMOND. No other questions. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Cook?

Senator COOK. Judge Winter, I do not want to become repetitious, but there are some things I would like to get in the record very distinctly and not in the nature of dialog, if you do not mind.

Judge WINTER. Certainly.

Senator COOK. This was a diversity case?

Judge WINTER. It was.

Senator COOK. So the law of South Carolina was exclusively in control of this case?

Judge WINTER. It was.

Senator COOK. Does that mean that the *Brunswick* case which you wrote would be precedent only for future cases arising in South Carolina and nowhere else?

Judge WINTER. No. It would of course have precedential value in South Carolina, but not be binding on the South Carolina courts. It

may also have precedential value in any other State which had similar statutes. I am not prepared to say at the moment, Senator, whether there are or not any other States that have similar statutes.

Senator COOK. But unless there were—let us take just the fourth circuit—unless there were other States that had similar statutes, it would not be a precedent for any States in the fourth circuit other than South Carolina?

Judge WINTER. That is correct. For example, I do not think it would have any precedential value in Maryland, where I am generally more familiar with the law.

Senator COOK. Could the Supreme Court of South Carolina overrule your interpretation of South Carolina law?

Judge WINTER. Yes; it could.

Senator COOK. Did your decision affirm the district court's opinion? You said that it did?

Judge WINTER. It did.

Senator COOK. This is kind of a leading question and I hope you do not mind. I will apologize for it. Since this case will have so little potential for application in the future, and since it affirms the judgment of the lower court, do you regard this case as a major precedent?

Judge WINTER. No; I do not.

Senator COOK. Did any of you regard the case as controversial or difficult?

Judge WINTER. No.

Senator COOK. Did you ever discuss the case with Judge Haynsworth after your November conference other than as far as procedure?

Judge WINTER. You mean on the substantive ruling?

Senator COOK. On the substantive matter.

Judge WINTER. No; I did not, except his saying to me that he had this memorandum which his law clerk had prepared, which suggested that maybe my characterization or my description of the South Carolina claim and delivery action might in effect be a shock to the South Carolina lawyers.

Senator COOK. Did Judge Jones agree with your opinion?

Judge WINTER. Yes; he did.

Senator COOK. So the outcome of this case was never in doubt in your mind after your meeting of November 10?

Judge WINTER. No; it was not.

Senator BAYH. Will the Senator yield just a moment. I think this was inadvertent.

Senator COOK. I have been patiently waiting ever since 10:30. Go right ahead.

Senator BAYH. As I recall my colleague, there was some reference to Judge Haynsworth preparing a technical denial of petition for hearing that I thought you had related. As I understood my colleague from Kentucky, it is a question that technically he indeed did participate for that. It may not be significant. I apologize if I am wrong.

Judge WINTER. No, Senator you are correct. Judge Haynsworth did prepare the order denying the second set of post-argument petitions. Is that where I have been inaccurate or I have confused you?

Senator BAYH. I am not certain you have been inaccurate. I apologize for interrupting my friend from Kentucky. I thought that was part of the question.

Senator COOK. After you circulated your opinion on December 27, were any substantive changes made?

Judge WINTER. No.

Senator COOK. Judge, we have been talking in terms of rule 26 and we have been talking in terms of rule 29. The rule that really applies to you and applies to Judge Haynsworth is found in 28 U.S.C. 455, not the canons of judicial ethics but the United States Code, and I would like to read that into the record in regard to the circumstances which you know about this case. Rule 455:

Interest of justice of judge: Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney to render it improper in his opinion for him to sit on the trial, appeal or other proceeding therein.

Is that not the rule that applies to you and to Judge Haynsworth and to all other judges in relation to whatever interest, whatever outside interest you may have?

Judge WINTER. Certainly, Senator, this—well, the acts of Congress are our Bible in how we conduct our court and conduct our office.

Senator COOK. You indicated earlier that you got on to this case because you disqualified yourself from another case in which you had participated as a lower court judge, that you had prepared some orders on whatever, is that correct?

Judge WINTER. That is correct, I had conducted a pretrial conference if you want to know precisely what I did.

Senator COOK. That falls precisely within the rule which provides that, "No judge shall hear or determine an appeal from the decision of a case or issue tried by him." Is that correct?

Judge WINTER. Well, that is correct. Technically I do not really think I decided anything in the pretrial conference which was the subject of appeal, but it is just the better part of discretion and the better part of good relations with the bar not to sit in such a matter.

Senator COOK. Now in regard to 28 U.S.C. 455, a case in which he has a substantial interest, do you feel in any way, shape or form that Judge Haynsworth had a substantial interest, even had you known of the facts?

Judge WINTER. Senator Cook, I would answer that by saying I think the test of the substantiality of his interest would be the simple arithmetic of what is his ownership in this litigant, and how can he be affected by the outcome, and by that test I think this mathematics speak for themselves.

Senator COOK. Judge Winter, I would like to pursue the mathematics just a little bit farther, and this is only for the record.

Senator Ervin said that the interest was 0.0005, I think he said.

Senator ERVIN. To be perfectly accurate it would keep running out 5's.

Senator COOK. Four zeros and then five.

Judge WINTER. I think of it in terms of 118/1000.

Senator COOK. All right, at 118/1000 interest in Brunswick Corp.?

Judge WINTER. That is right.

Senator COOK. Now it is interesting to note, Judge, that not only was this interest this minute, but it is also interesting to me to know

that the Brunswick Corp., in its bowling alley interest, only has 3 percent of its entire business that is dedicated to the bowling field. The thing that I am really trying to get to, Judge, is that if we are going to discuss this from the standpoint of what stock a judge may have, do you think it is incumbent upon the judge, when he buys stock, that it is incumbent upon him to look not only to that company but whether that company has other companies or whether it has subsidiary companies, and that it is incumbent upon him to go to the extent, for instance, to determine that the Brunswick Corp. owns McGregor, Sipco, Union, it also owns the Owens Yacht Co., it also owns the Mercury Outboard Motor Co.

Now, isn't it conceivable that in the fourth circuit that cases could come before your court that might involve any of these, and the point I am trying to make in this deliberation is if this is to be done, is it necessary that when you, or myself as a member of the Senate under ethical rules, if I buy a share of stock, that it is incumbent upon me to determine every company that that company may own, and that therefore I stand in line of not only disqualifying myself for 10 companies that I may own stock in but that I may in fact be disqualifying myself for 150 companies that I may have a tacit interest in one way or the other?

Judge WINTER. Certainly, Senator, with the growth of conglomerates and the tendency of so many companies to diversify, this presents a real problem. I know myself that inadvertently once or twice I have almost sat in cases where parties were subsidiaries of something on which I had an investment, and quite frankly I did not recognize it until the very 11th hour. I just do not know what the answer is. It becomes almost impossible to learn all the trade names and all the subsidiary names and what have you, if you are about to make an investment, so that you are fully advised, if you are in judicial office, when one of the parties in which you may have an interest or do have an interest is before you.

Senator COOK. Judge, in reviewing Brunswick versus Long, one comes to the conclusion that the most that could have been awarded to Brunswick is $140,000. That includes the court having been able to sustain that Long and the Beach Corp. were also entitled to $50,000 in punitive damages. That would have made the total judgment, had you rendered totally and completely in favor of Long and Beach, $140,000. Do you consider that a judgment rendered in favor of Brunswick for the entire $140,000 would have represented under 28 U.S.C. 455 a substantial interest and a substantial benefit to Brunswick, who in the year of 1967 had gross sales of $379.1 million?

Judge WINTER. Well, should from the standpoint of Brunswick, after all, it is a corporation, its purpose is to make money, I would not consider it insubstantial, but I would say from the standpoint of Judge Haynsworth, under the mathematics, I would not have considered that he had a substantial interest in this litigation.

The CHAIRMAN. Senator Mathias?

Senator MATHIAS. Mr. Chairman, I would like to join with my colleague, Senator Tydings of Maryland, in a special welcome to Judge Winter. He served as special assistant attorney general of Maryland, and I followed in his footsteps. He has always been exceedingly helpful in any matters in which we had mutual interest.

I am grateful to him for being here today.

Judge Winter, Senator Bayh earlier this morning read into the record the canons which apply to this case, and later Senator Ervin read into the record the provisions of the statute which apply to this case.

I think it is clear that if the statute had been violated, we probably would not be holding this hearing. In your judgment, is the canon just as binding as the statute?

Judge WINTER. I am sorry, I missed the crucial word.

Senator MATHIAS. In your judgment, is the canon as binding as the statute in a matter of this sort?

Judge WINTER. Well, I think that the statute is absolutely binding.

Senator MATHIAS. There could be no question about that?

Judge WINTER. That is right. I think although the statute itself, from its very nature, admits of some interpretation, I mean some judgment factors, the canons, I would think, while they are not absolutely binding in the same sense the statute is, are entitled to the very greatest of weight, and I think that certainly any judge ought to try to keep himself within the spirit as well as the letter of the canons, except if it should happen, and I do not know that this is possible or not, but if there is a real conflict between the statute and the canons, I would think that as a Federal judge if the statute is valid, he would have to abide by the Federal statute.

Senator MATHIAS. There is no such conflict?

Judge WINTER. Not that I am aware of.

Senator MATHIAS. The ones before us pertinent to this hearing?

Judge WINTER. Not that I am aware of at the moment.

Senator MATHIAS. You said, of course, and I think we all recognize that it could happen, that inadvertently a judge might be in a situation with full knowledge of the facts he would have disqualified himself, such as the fact that a stock in which he had an interest, substantial or otherwise, which in turn held the controlling interest in a subsidiary company which was a litigant, he did not know that this subsidiary even existed, he could inadvertently sit on the case. I think you volunteered that you had come close to that situation.

Judge WINTER. That is true.

Senator MATHIAS. Do you think it is, however, a rule in the Federal judiciary that when a judge with knowledge, and I am not asking you to speak broadly for all of your brother judges, but as we would say if we were trying a case, what is the custom in the trade of a Federal judge with knowledge that he owns a stock of any value in a corporation, as to sitting in judgment on that case?

Judge WINTER. Well, I think the rule of thumb is that if he has knowledge, he ought not to sit in the case unless there is some exceptional circumstance, and the parties or the counsel for the parties agree that he should sit. I have reference to this fact, Senator. We, of course, live in a metropolitan State, and the Court of Appeals of the Fourth Circuit is a metropolitan court. I mean it is a multijudge court.

There are a great number of judges or a number of judges on the U.S. District Court for the District of Maryland. So that to me, if

you know that you own stock in a case of this sort, and there is another judge you ought to disqualify yourself and let another judge step in. Now it may happen by reason of illness of other judges or it may happen in a district which is widely spread out and other judges are not readily available that you have a breakdown temporarily in the function of the court.

In that event I think it is certainly proper to go to the parties and say, "I was going to disqualify myself. I own blank shares of stock in this company, but on the other hand I am not going to be able to get a replacement. Your case is going to have to be continued or what have you. What do you want me to do under the circumstances?"

If they come back and say, "We want you to sit," then I see nothing wrong in sitting.

Senator MATHIAS. In other words, it is really what you advocate or what you outline here is the policy of disclosure of assets. Any interested member of the public who has the right to be aggrieved by some fact that the disclosure of assets reveals, even for this limited purpose, can make his grievance known, and it can be acted on.

Judge WINTER. Well, Senator, not to back away from your question, I am not sure that I want to be understood as advocating it, but I recognize the disclosure of assets——

Senator MATHIAS. It is a limited form of disclosure of assets.

Judge WINTER (continuing). That disclosure of assets might go far to meet the problem that we have been discussing.

Senator MATHIAS. We are in the unfortunate situation today that Judge Haynsworth, because of the sequence of events, could not have done that, because he was not beginning the case. However, of course, his acquisition of the stock in a later period relieves any question of notice in the matter of inadvertence.

Judge WINTER. If he was in fact aware of it. I do not know—I mean of this case, Senator, and on that you will have to ask him. I cannot supply the answer to the question.

Senator MATHIAS. We will ask him. We do not charge you with that.

Again, Mr. Chairman, I am very grateful to Judge Winter for being here and being helpful as he always is.

Judge WINTER. Thank you, Senator.

The CHAIRMAN. Senator Griffin?

Senator GRIFFIN. Mr. Chairman, being the most lowly member in terms of seniority, all of the questions I had planned to ask have been explored in sufficient detail. Thank you very much.

Senator ERVIN. I would like to ask one other question.

The CHAIRMAN. Let me make an announcement just before that. There is a Republican policy luncheon, and when we recess we will come back at 2:30.

Senator ERVIN. With reference to petitions for rehearing, in what period of time under the rules of the fourth circuit does a litigant who has lost a case——

Judge WINTER. I am sorry, I cannot hear you.

The CHAIRMAN. Let us have order.

Senator ERVIN. I said within what period of time does a litigant

who has lost a case before the fourth circuit have the right to petition for rehearing?

Judge WINTER. In civil cases, 30 days, sir.

Senator ERVIN. Thirty days. Now, no petition for rehearing was filed within the 30 days; was it?

Judge WINTER. No, it was not.

Senator ERVIN. And there was an application made for extension of the time for rehearing, but the application was denied?

Judge WINTER. That is correct, sir.

Senator ERVIN. And you and Judge Jones participated in that denial, did you not?

Judge WINTER. We did. As a matter of fact, I was the one who initially advocated it.

Senator ERVIN. Now, under the rules, when was the rule required for granting of the petition for rehearing?

Judge WINTER. I am not sure that the rule was very specific on that. I think probably the practice in our court is that if any one judge on the panel thinks that there is enough there that perhaps the case had been wrongly decided, that we would agree to indulge him in hearing the case again.

Senator ERVIN. Now, a petition for rehearing was not, technically speaking, ever filed in this matter?

Judge WINTER. No, not technically, although the reasons for rehearing were suggested in the petition.

Senator ERVIN. Yes.

Judge WINTER. And in entering the order, we indicated that we did not think the reasons had substance.

Senator ERVIN. Now you and Judge Jones were of the opinion that the original denial of an extension of time for the filing of a petition for rehearing ought not to be reconsidered?

Judge WINTER. That is correct.

Senator ERVIN. As a result of my very long experience as a practicing lawyer, and my experience as a judge, I have come to the conclusion that if there is anything in which lost labor is completely lost, it is in filing a petition with a court for rehearing of a unanimous opinion, especially in a case where that unanimous opinion has been expressly or tacitly approved by all seven judges of the court.

Judge WINTER. Take heart, Senator. Occasionally it works.

Senator ERVIN. We will stand in recess until 2:30.

Judge WINTER. I am excused, sir?

Senator ERVIN. Yes.

(Whereupon, at 12:30 p.m., the committee recessed, to reconvene at 2:30 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN. Stand up, Mr. McCall.

Do you solemnly swear the testimony you are about to give is the truth, the whole truth, and nothing but the truth so help you God?

Mr. MCCALL. I do.

The CHAIRMAN. Please identify yourself for the record.

TESTIMONY OF ARTHUR C. McCALL, GREENVILLE, S.C.

Mr. McCALL. I am Arthur C. McCall, from Greenville, S.C.

The CHAIRMAN. What is your business?

Mr. McCALL. I am in the investment management business.

The CHAIRMAN. Is Justice Haynsworth a customer of yours?

Mr. McCALL. Yes, sir.

The CHAIRMAN. Tell us all that you know about his purchases of some Brunswick stock.

Mr. McCALL. All right, sir.

May I refer to this?

The CHAIRMAN. Why of course.

Mr. McCALL. I have here, Senator, a handwritten confirmation in my handwriting dated December 15, 1957, and stamped by me at 4 p.m. in the afternoon. The market had closed, closed at 3:30. This was a suggestion that I made to Judge Haynsworth, as has been——

The CHAIRMAN. To begin with, Judge Haynsworth sold some stock, did he not?

Mr. McCALL. Yes, sir.

The CHAIRMAN. What was that stock that he sold?

Mr. McCALL. Insurance securities.

The CHAIRMAN. Insurance securities?

Mr. McCALL. Yes, sir.

The CHAIRMAN. All right. Then were you to reinvest the money?

Mr. McCALL. I usually did, yes, sir.

The CHAIRMAN. All right. Now, proceed.

Mr. McCALL. Well, may I tell it in my own way, sir?

The CHAIRMAN. Sure.

Mr. McCALL. As has been the custom with Judge Haynsworth for several years, we get together toward the latter part of the year and review his investment holdings, where I make suggestions to him for tax purposes, or where there might be an opportunity to improve the position that he has, and I am not certain that this was on the 15th of December that we had this conference but I recommended to him that he buy Brunswick stock. His was no isolated case. I had recommended it to any number of accounts of mine who had bought it.

The CHAIRMAN. You say this was not an isolated case?

Mr. McCALL. I beg your pardon?

The CHAIRMAN. You say this was not an isolated case?

Mr. McCALL. No, sir. He said, "All right, go ahead," so Monday morning, which was the 18th of December—I am holding in my hand a form that we use when we enter orders, the number of the order for the day, whether it is a buy order, sell order, number of shares, name of the security, price at which it was entered, price at which it was executed, and from whom it was bought or sold, and order No. 3 on the 18th—I beg your pardon, order No. 5 on the 18th—was to buy 1,000 shares at 15½.

At the end of the day the clerk who handles it has written here, "N done," nothing done. Order No. 3 that same day was for 100 shares for someone else. I do not know who that was for. Nothing was done.

Again this handwritten confirmation is time stamped by the clock in our wire room. It has got the date it was entered. It has a time stamp

on it. That order was reentered again on the 19th at 15½. Nothing was done, no execution. On the 20th order No. 9 was to buy 1,000 at 16. Now I changed that. That was my judgment to change the order from 15½ to 16.

The relationship that I have with the judge is that he does not quibble about a quarter or half a point. If it is a good buy go ahead and use my discretion to buy it, which I did. It was not executed on the 20th.

The same thing was entered, order No. 15, on the 21st at 16, nothing done. The 22d order No. 6 at 16, nothing done. On the 26th of December, the day after Christmas, the order was entered at 16, and this is stamped executed at 3:02 in the afternoon, when we bought it, and that is when his confirmation of buying it went out to him, and we received a check for it on the 28th of December.

The CHAIRMAN. What size company is Brunswick?

Mr. MCCALL. Brunswick has 18 million shares outstanding. It is a big company, and in 1965 they had a little rough sledding from the bowling alley business. It took some substantial losses, and the stock had declined a year or two before that from around 75 down to seven, and I became interested in it as a vehicle for my clients for capital gains, because it appeared to me that it was a turn-around situation, No. 1.

Second, I noticed that the mutual funds or investments trusts had been buying very heavily in it, which was indicative to me that their computers or their analysts felt the same way that I felt, so that is what prompted me to get interested in Brunswick.

The CHAIRMAN. It was your suggestion to Judge Haynsworth to buy the stock?

Mr. MCCALL. Yes, sir.

The CHAIRMAN. Well, would you say Brunswick is a $400 million corporation?

Mr. MCCALL. I have got a slip out in my briefcase and I can give you precisely the facts on it, if you will bring my briefcase, please.

Senator BAYH. I have a suspicion somebody on this side of the witness table may be able to give you the answer to that question.

Mr. MCCALL. I beg your pardon?

Senator BAYH. I say, partially in jest, partially in seriousness, I would not be surprised if someone on this side of the table could answer the question that you were just asked, Mr. McCall. Does anybody know, Mr. Chairman, as to the value?

The CHAIRMAN. I do not.

Senator BAYH. Perhaps I should but I do not.

Senator ERVIN. While we are waiting, did I understand you to say this stock several years before was as high as $75 a share?

Mr. MCCALL. Yes, sir; between 74 and 75.

Senator ERVIN. And it had fallen to seven?

Mr. MCCALL. Seven. I will give you the statistical information.

Senator ERVIN. I did not know any stock except political stock fell that fast. [Laughter.]

Mr. MCCALL. It had sales in 1968 of 421 millions. Its price range in 1961 was 74⅞ high, 44 low. The next year 52¾ and 13, the next year 20 and 10. In 1964, 12⅜ and 7¾, in 1965, 7⅛ and 11½, in 1966, 12¼ and 6

was the low, in 1967, 14⅝ to 7, in 1968, 20¾, 12½, and in 1969, 25 and 16⅛, according to Standard and Poor's published record.

The CHAIRMAN. Any questions?

Senator MCCLELLAN. No.

The CHAIRMAN. Senator Ervin?

Senator Dodd?

Senator BAYH. How long have you known the judge, Mr. McCall?

Mr. MCCALL. Since 1932.

Senator BAYH. Had you been adviser to him or for him in this whole business of financial transactions for a long period of time?

Mr. MCCALL. I have since the late 1930's.

Senator BAYH. I notice in 1947 you and he were cotrustees in the trust, have you had other similar type business relations?

Mr. MCCALL. Yes, sir.

Senator BAYH. How much of his business do you have? Are you his only stockbroker? Are you familiar with the transaction and do you have control of his entire portfolio or just part?

Mr. MCCALL. I think you would have to ask him that, but I think I did all of it or practically all of it.

Senator BAYH. How much business does this amount to in a year, do you have any recollection?

Mr. MCCALL. I have got the facts here from my original documents.

Senator BAYH. I mean how difficult is it to find out? Do you have some place where you could tell how much business you did with Judge Haynsworth say in 1968, the year in question?

Mr. MCCALL. I think I can; yes, sir.

Senator BAYH. If it is too much trouble, you can supply it later on.

Mr. MCCALL. Your question was in 1967?

Senator BAYH. 1967–68. Just give us some general idea.

Mr. MCCALL. You want number of transactions? I can give you that much easier than I can give you the dollar amount.

Senator BAYH. Why don't you give us the number of transactions, and then if you would let us have the dollar amount for the record later on, so it will not tie up the committee.

Mr. MCCALL. Yes, sir.

Senator BAYH. And I trust you also have there the kinds of stock. In other words, you could give us the information as to the number of transactions, the total amount and the corporations involved during the period that the judge sat on the bench?

Mr. MCCALL. I am sure I can; yes, sir.

Senator BAYH. Mr. Chairman, I would like to have that information if you please to be held in confidence within the committee.

The CHAIRMAN. Judge Haynsworth has compiled it and will be glad to give it to you.

Senator BAYH. Fine. Thank you.

What type of relationship do you have? It goes back for quite a while and it has been rather close apparently with the trust. Is this the type of thing where he has complete trust in your ability to go ahead and invest his money without asking his opinion of it, or do you consult with him, or do you have to persuade him that Brunswick is a good thing to buy, or if Arthur McCall thinks it is a good thing to buy, do you go out and place the order?

Mr. McCALL. You have asked me several questions. Which one do you want first?

Senator BAYH. You can start one at a time. It would be fine if you will answer them all if you will, please.

Mr. McCALL. My relationship, he was responsible for pledging me to his and my fraternity in college, and we have been warm friends ever since. We have been in business situations together, and I see him socially as well as businesswise.

So far as me taking upon myself responsibility of investing his money without consultation, I would not do it. I bring to his attention things that I think have appeal, and he gives me the yes or no.

Senator BAYH. In other words, I suppose he gives you the yes or no, and then uultimately he has to sign?

Mr. McCALL. He has to pay for it, yes, sir.

Senator BAYH. Some documents he has to sign, a check or whatever it is, to get the money out of the bank account?

Mr. McCALL. He has to pay for it.

Senator BAYH. On this Brunswick matter now, Mr. McCall, you stated as I recall it was around the 15th of December, or at least the 18th that you had an order there to buy 1,000 shares?

Mr. McCALL. Yes, sir.

Senator BAYH. Will you please tell this committee if prior to the 18th of December, at an earlier date, you did have an order to buy at that amount or a lesser amount?

Mr. McCALL. Yes, sir; the first date that I had an order was the 15th, which was Friday afternoon.

Senator BAYH. You had no order that had been submitted for a lower figure in November?

Mr. McCALL. No, sir.

Senator BAYH. Or in October?

Mr. McCALL. No, sir.

Senator BAYH. Or in September?

Mr. McCALL. To my knowledge this is the first time Brunswick had been brought to his attention.

Senator BAYH. December 15 is the first day?

Mr. McCALL. Yes, sir.

Senator BAYH. To your knowledge?

Mr. McCALL. And as I said earlier, I believe we had had a conference after lunch to go over his holdings, and that is when I suggested this to him, and this is when I wrote the order up, and put it in on Monday morning.

Senator BAYH. Was this as the chairman suggested the result of the sale of other stock, this other fund that you mentioned?

Mr. McCALL. Well, he had some funds from some losses that he had taken.

Senator BAYH. You felt these funds should be invested then?

Mr. McCALL. Yes, sir.

Senator BAYH. How many dollars did he have in that fund of idle cash at the time?

Mr. McCALL. I would estimate around $20,000.

Senator BAYH. And how much of that $20,000 did you invest for him in Brunswick?

Mr. McCALL. $16,250 I believe is the figure.

Senator BAYH. So you invested about three-fourths or better of the cash that was not previously invested?

Mr. McCALL. Yes, sir.

Senator BAYH. The liquid assets that you had at that time, the liquid assets that were available at that time. You invested about three-quarters of them?

Mr. McCALL. Yes, sir.

Senator BAYH. How was the stock paid for, please, Mr. McCall?

Mr. McCALL. By check.

Senator BAYH. By check? The judge paid for this by check?

Mr. McCALL. Or out of his stock account or how was it?

If there was any balance in his account, we did not keep the balances. We would normally send them to him, and any transactions he would issue his check back to us in payment. Anything that he sold we would remit to him as a general rule.

Senator BAYH. You are familiar with the list of stock holdings that the judge kindly submitted to us that he had at the time it was requested when the hearings started. You are familiar with those?

Mr. McCALL. Yes, sir.

Senator BAYH. Have you had a relationship with those in purchasing and selling stock of that kind?

Mr. McCALL. Yes, sir.

Senator BAYH. Have you ever bought any C. & O. stock for the judge?

Mr. McCALL. Not to my knowledge. I do not recall.

Senator BAYH. This would be on the record of the transactions?

Mr. McCALL. Yes, sir; it would be in my jacket.

Senator BAYH. Do you know whether the judge owned any C. & O. stock?

Mr. McCALL. I have no record of it.

Senator BAYH. So we do not tie up the hearings, if you will let us have the information we would appreciate it. I notice from the judge's portfolio that he has some shares of Nationwide Container Corp. Did you purchase these stocks?

Nationwide Container?

Senator BAYH. Nationwide Corp., I am sorry.

Mr. McCALL. Yes, sir. I did, I bought it for him.

Senator BAYH. You are aware that in his portfolio he listed 500 shares, being about $5,112 in the Nationwide Life, 20 shares being $340.

Mr. McCALL. His 500 shares the date it was bought and the top price at which it was——

Senator BAYH. What date was it bought?

Mr. McCALL. July 8, 1964.

Senator BAYH. July 8, 1964. How much did he pay for it again, please?

Mr. McCALL. Fourteen and three-fourths.

Senator BAYH. Do you have any—and I bring this up because of speculation that has been attributed in various news accounts. I have no evidence and only want to suggest that it ought to be brought up so that the air can be cleared. Did you buy so-called magic stock that was listed in the portfolio?

Mr. McCALL. Mortgage? Are you speaking of Mortgage Guaranty Investment?

Senator BAYH. It is a stock that has been subject to some controversy, and just because the judge owns it does not mean he is at all part of that previous controversy, but I would just like to know if you know anything about the purchase of that stock that we should know so that we can clear the record up and take that onus off.

Mr. McCALL. If you will give me a moment to inspect this.

Senator BAYH. Please.

Mr. McCALL. From a quick look at my list it does not show on this that I keep in my resk, my record.

Senator BAYH. It might be fair, Mr. Chairman, not to ask Mr. McCall to try to dig through his papers, because I thought that I could find it under the present circumstances myself. If we could just ask him to submit that information either yes or no later on and if so what dates and under what circumstances I will be perfectly satisfied with whatever answer you might give us, if that is all right with you, Mr. Chairman, so we do not hold this out and embarrass anybody. You are going to let us have those records; are you not?

Mr. McCALL. You want totals; do you not?

Senator BAYH. Yes; if you please.

Mr. McCALL. 1967 and 1968?

Senator BAYH. I would like to have, if it is not too much trouble, itemized stock that you sold during the term that the judge has been on the bench. I appreciate very much your letting the committee have the benefit of your thoughts. I realize your personal relationship with Judge Haynsworth, and being a fraternity brother that undoubtedly makes a more difficult situation, and I appreciate your coming before the committee and letting us have this information.

Mr. McCALL. Yes, sir.

The CHAIRMAN. Senator Tydings?

Senator TYDINGS. I do not have anything.

Senator HRUSKA. No questions, Mr. Chairman.

The CHAIRMAN. Senator Griffin?

Senator GRIFFIN. Mr. McCall, when you advised Judge Haynsworth to buy Brunswick stock, did he say anything to you about the fact that litigation concerning the Brunswick Corp. was pending in his court at the time?

Mr. McCALL. No, sir.

Senator GRIFFIN. Did Judge Haynsworth always take your advice concerning purchase of securities?

Mr. McCALL. I think you had better ask the judge that, sir. I would say that the majority of the time that I made a recommendation or suggestion to him, that it would be followed, if funds were available.

Senator GRIFFIN. Do you recall whether or not he has ever indicated to you that he could not follow your advice and buy a particular stock because there was litigation pending in his court—or because the recommended company was apt to be involved in litigation in his court?

Mr. McCALL. I do not recall.

Senator GRIFFIN. Thank you very much.

Senator MATHIAS. Mr. Chairman.

Mr. McCall, you said that the Brunswick stock was purchased with funds which had been accumulated when you were washing out some

losses in the portfolio. Do you remember what was the source of those funds?

Mr. McCALL. He sold insurance securities; yes, sir.

Senator MATHIAS. It was the sale of insurance securities?

Mr. McCALL. Yes, sir.

Senator MATHIAS. And how long had that money been on hand?

Mr. McCALL. November 30, December 5, December 15 are the sales dates on transactions.

Senator MATHIAS. What was sold on each of those days?

Mr. McCALL. Insurance securities on the 30th, on December 5 insurance securities, and on December 15 insurance securities.

Senator MATHIAS. In each of those sales were you the moving party? Did you suggest it or did the judge suggest it?

Mr. McCALL. Yes, sir; we were reviewing for tax purposes, year-end, taking advantage of the tax losses.

The CHAIRMAN. He asked you if it was your suggestion that he sell that stock; is that right?

Senator MATHIAS. Yes; was it your suggestion? Did you initiate the proposal to sell the stock?

Mr. McCALL. I think I did; yes, sir.

Senator MATHIAS. When you were paid on the 28th by check for the Brunswick stock, did the judge sign the check or was it signed by some agent or attorney of his?

Mr. McCALL. I do not have a copy of it, but I would say that he signed it.

Senator MATHIAS. Personally?

Mr. McCALL. Yes, sir. I have never got a check from him for anything he bought that he did not sign himself.

Senator MATHIAS. Had you ever, as his financial adviser—and let me say, sir, you seem to have been very successful—in the course of this relationship had you ever become aware in any way of the somewhat delicate situation in which a member of the Federal bench is poised, and did this fact enter into your calculations when you made a recommendation to Judge Haynsworth?

Mr. McCALL. No, sir; I do not think it entered into my consideration at all.

Senator MATHIAS. It never crossed your mind that he was in any special situation?

Mr. McCALL. Well, there would be no way that I would know. To my knowledge I never had brought anything to his attention that there was any doubt, any conflict at all.

Senator MATHIAS. That is all, Mr. Chairman.

The CHAIRMAN. Senator Burdick?

Senator BURDICK. I missed the earlier examination. I will read the testimony.

Senator ERVIN. I would like to ask one question. It was a part of your profession or vocation to study the prospects of different kinds of stocks, and to advise your clients in respect to those matters?

Mr. McCALL. Yes, sir.

Senator ERVIN. And so far as you are able to say, in the great majority of instances where you made a recommendation to Judge Haynsworth in respect to the stock you thought he ought to buy, he followed your recommendations?

Mr. McCALL. Yes, sir.

Senator COOK. Mr. Chairman. Mr. McCall, being in the securities business for profit, and obviously you are, do you have a recollection during that period of time about how much Brunswick stock you bought for clients other than Judge Haynsworth?

Mr. McCALL. If you have got a minute I can give you a pretty good guess.

Senator COOK. I would appreciate it.

Mr. McCALL. If you will bear with me I will jot it down.

Senator COOK. Yes.

Mr. McCALL. My quick calculation, and don't hold me to the exact number, but this adds up to 15,500 shares.

Senator COOK. 15,500 shares of Brunswick in all?

Mr. McCALL. Yes, sir.

Senator COOK. So you were not really giving the judge any great inside tip that you were not giving to your other good customers; were you?

Mr. McCALL. No, sir.

Senator COOK. Thank you, Mr. Chairman.

The CHAIRMAN. Are there any further questions?

Thank you, Mr. McCall.

Judge Haynsworth.

Judge, tell us what you know about this Brunswick stock.

TESTIMONY OF HON. CLEMENT F. HAYNSWORTH, JR., NOMINEE TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge HAYNSWORTH. Mr. Chairman, most of what I know of, of course, has been told by Judge Winter and Mr. McCall. I can fill in a little bit from the point of view of what I know. As Judge Winter explained this morning when he was on the stand, we heard this case November 10, 1967.

At that time I owned no stock in either party. I had no financial interest whatever in it. There was no reason in the world that I should not sit. I knew nothing about the stock of Brunswick.

We conferred immediately after the case was heard. There was no doubt in the mind of either one of the three as to what the result should be. Indeed, we thought it rather a fruitless appeal. We thought it should be decided on the basis of a very brief order.

We talked in terms of doing that that very day. Just as an aside, Senator Cook spoke about what was involved. Of course, there were some substantial amonnts mentioned. There were liens in very old used bowling equipment, the worth of which I do not know. One fellow said $2,000, another person said maybe 10, but the dispute was about the competing liens, and the landlord has been given a preferred lien for the rent which was accrued.

He claimed, of course, that he should have been allowed a lien for unaccrued rent. Later the building was released to somebody else and he got his rent for the unaccrued period, but he wanted it twice, and there was no doubt in our minds he was not entitled to it, wanted it twice insofar as the worth of this equipment is concerned.

We decided that we would not summarily affirm that afternoon, because the district judge had used some language that we were not prepared to endorse, and because of that, we thought we should write out our own opinion. The opinion was assigned to Judge Winter to write, and at that point I was done with what work I had to do on the case and I passed on to others, and I put this one out of my mind.

I may explain here that we work in very concentrated fashion in cases when they are before us. Senator Ervin, from your experience as a judge, I know you know what you do, and when you make up your mind it is done and you are through with that case and you go on to something else.

We had a great press of cases, of course, at that time. We still do. And you move as quickly as you can to something else. When you are done with one you lay it aside mentally as well as physically.

Some 6 weeks after that, I had sold some insurance securities stock. In my own records I do not find a sale on the 5th. I am sure Mr. McCall is right. Four hundred shares were sold in the last of November, on the 30th, but 1,500 shares were sold on December 15, and this was the burden of the funds that I had available for investment.

Shortly before the Brunswick stock was purchased, Mr. McCall recommended that these funds that I had for reinvestment be invested in Brunswick. I do not remember a great many of the details of the stock. I do remember his informing me that it was making any number of things that he thought should turn out well.

One I do remember was the outboard motors made by Mercury. I told him all right, go ahead, and he went ahead. I have no way to precisely fix the date. It was shortly before the 26th when the order was executed.

His notes indicate that it was December 15, and I suppose that is correct. Apparently the order was executed on December 26, because I received a statement from him on the 27th. The statement is dated the 26th. And my secretary, she does not like an unpaid bill lying around 1 minute, she promptly drew a check.

The first time I saw the report the check was attached. I signed it on the 27th. It was returned to him and I presume he received it on the 28th.

The case that we had, of course, did not enter my mind at the time. If it had been in my mind I would not have bought the stock. I did not check the cases that had been heard in my court and were not disposed of. I think I should have in the course of buying a stock. Afterwards, this is a precaution I would take. I did not take advantage of it then and, of course, I am very sorry I did not. But the fact that there was a case that I heard 6 weeks earlier, and I will say as far as I was concerned I was done with it, did not enter my mind when Mr. McCall suggested that funds I had be invested in this stock. I said all right, and it was so invested.

Just for the record, if anyone wants it, I received certificates on the stock. They are dated the 15th of the next month. I received them on the 20th of January 1968, and they are here if anyone wants to see them.

The next time, of course, that the case entered my mind was when I received the proposed opinion from Judge Winter. At that stage,

I realized it had not been completely disposed of, and at that time I thought what I should do. I had now become a stockholder.

My conclusion was that I should endorse it since Judge Winter had written an opinion precisely as we had agreed, since Judge Jones concurred, since no one had any doubt about it, and nothing else occurred to return the case to the discussion stage. Now, it does occur sometimes, as was brought out from Judge Winter, that when an opinion is assigned to a judge for a number of reasons he may change his view.

This may be the result of something he found in the record of which we were not aware. It may be the result of some research he did in his library to bring out some point that we were not aware of, were not fully appreciative of, and the case then reverts to the conference stage. It goes back for a brand new, fresh viewpoint. That happens now and then, not with great frequency but it does occur.

Nothing of the sort occurred in this instance. If it had occurred, I would have gotten myself out. Indeed I would not only have gotten myself out, I would have gotten Judge Winter out and Judge Jones, because if I was not qualified to sit in this case, I had conferred with them and if it was wrong for me to be in, it was wrong for them to be in it, so I would have gotten all three out and the case would have been set to be reheard before three new judges.

As against that, I thought that really the decision had been made in November, long before I knew anything about Brunswick stock or became a stockholder, and in the interest of judicial efficiency, I should go on and endorse my name on the opinion as approving what we had agreed upon, as approving it as an expression of what we had agreed upon back in November.

That, of course, I did. I do not think that was acting in a strictly judicial capacity at the time because it was merely an affirmation of what we had agreed upon some, well, 8 weeks earlier.

As I say, Judge Winter said that he would not have bought this stock and I agree with him completely. I would not have bought it either if I had been aware of the fact that this case that we had heard in November had not been disposed of. Afterward I saw no reason why I should not proceed as I did in light of the circumstances and the fact that there was no reversion of this case ever to the conference stage. So I signed it and that was that.

I do not think under the circumstances that under the statute, I did not think then, I do not think now, that what I did in the decisional process in that case was done while I had any interest whatever in the case or in its outcome.

The CHAIRMAN. I hear you are a big stockholder in the C. & O. Railroad. Tell us about your Chesapeake and Ohio stock.

Judge HAYNSWORTH. I own no C. & O. stock. Senator Bayh asked about it. It is true that on my joint income tax return with my wife there may be some reference to a dividend on C. & O. stock.

Last year, Mr. Chairman, my wife had a friend who attended a stockholders' meeting of the C. & O. at the Greenbriar, where they have them and they invite all the stockholders to come at their own expense, by the way, not at the expense of the C. & O., and my wife thought it might provide an excuse to entice me away for a long weekend.

If we received an invitation from the C. & O. to attend the stockholders' meeting at the Greenbriar, even though it was at my expense, she thought——

Senator BAYH. Mr. Chairman, If I could interrupt, Judge, I completely understand why your wife would like to entice you to the Greenbriar. Mine likes it too.

Judge HAYNSWORTH. You know. So she went down and bought 10 shares of C. & O. stock. She paid $641 for it, and squirreled it away in the hope that some time she would receive an invitation to go to that stockholders' meeting with which she could confront me.

Senator MCCLELLAN. I did not understand how much she spent, how much she paid?

Judge HAYNSWORTH. $641.

Senator MCCLELLAN. Bought $641 worth?

Judge HAYNSWORTH. Ten shares. This included commissions, taxes, stamps and whatever else goes into it. And she squirreled it away, in the hope that she could induce me, upon receipt of the stockholders' notice, to take her for a long weekend to the Greenbriar.

The CHAIRMAN. That is 10 shares?

Judge HAYNSWORTH. Ten shares. And after that, to complete it, I sat on a case involving the C. & O.

Senator ERVIN. If I may inject myself at this point, I have been invited several times to go out to the Greenbriar and make speeches to several organizations and in every case my wife just laid the law down to me and told me I had to go.

Judge HAYNSWORTH. I like it, too. I do not blame them. Incidentally, I told someone my wife is like most wives, Senator Ervin. As a result of the marital relation that we have, she understands completely that what is mine is hers and what is hers is hers, too, and these 10 shares were hers, and she controlled them. But since the question has been raised, I did sit on a case involving C. & O. It was a seaman's claim for injuries. He had been sent in to clean a space where a lot of grease had been and he was sent in to clean it up. He slipped on a grease spot. The district judge said he had no right to claim that the ship was unseaworthy by reason of the grease that he was supposed to clean up.

He appealed to my court and we held that yes, he was entitled to the claim and we sent it back to the district judge to find the extent of his damage.

The CHAIRMAN. You decided against the C. & O.?

Judge HAYNSWORTH. The C. & O., except it came back because after he went back and the district judge made an award he was not happy with that and he appealed and claimed more. Of course, we get appeals sometimes from people who say that the jury or the judge awarded too much or too little, and these do not, very frequently, get much attention in the court, because we all have a very high regard for the jury and what it does when it fixes its award.

So it came back up with a very brief order. We denied the appeal, when he complained about the amount of the award, but it was certainly adverse to the railroad to the extent that he got anything.

Senator MCCLELLAN. I do not recall the date of the decision. I did not hear you a while ago. What was the date of the decision in the *Brunswick* case, the date that you made your decision?

Judge HAYNSWORTH. It was heard and decided as far as the substance was concerned on November 10, 1967.

Senator MCCLELLAN. November 10. When was this stock purchased?

Judge HAYNSWORTH. The stock was purchased, ordered on December 26, 1967.

Senator MCCLELLAN. December 26?

Judge HAYNSWORTH. 1967.

Senator MCCLELLAN. Was that the date that it was ordered?

Judge HAYNSWORTH. This is the date that the transaction was executed on the New York Stock Exchange.

Senator MCCLELLAN. That is the date it was actually purchased?

Judge HAYNSWORTH. Actually purchased.

Senator MCCLELLAN. That would be 36 days after the case was heard and you had made the decision?

Judge HAYNSWORTH. More than that I believe, from the 10th of November to the 26th of December would be more than 36 days.

Senator MCCLELLAN. It would be 46 days. At the time you decided the case, on the day you heard the arguments, I understand immediately thereafter the court went into conference or whatever you call it?

Judge HAYNSWORTH. Yes.

Senator MCCLELLAN. The three judges, you and the other two discussed the merits of the case, and immediately decided it?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. I understood you to say a while ago that you all thought alike, all three of you—that it was kind of a fruitless appeal.

Judge HAYNSWORTH. It was.

Senator MCCLELLAN. Did you mean by that that it was groundless, that there was really no merit in the appeal?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. Was there any controversy in your deliberations about it? Were any of the three of you inclined to hold the other way?

Judge HAYNSWORTH. No.

Senator MCCLELLAN. From the beginning of your deliberations?

Judge HAYNSWORTH. Not one of the three had the slightest doubt in the world.

Senator MCCLELLAN. Am I correct that the decision was appealed? Or rather a writ of certiorari was denied by the Supreme Court?

Judge HAYNSWORTH. Yes, it was.

Senator MCCLELLAN. Evidently confirming what the three judges had found, at least that there was not any grounds for appeal?

Judge HAYNSWORTH. Well, they say that the denial of certioari does not always mean that, but they did decline to review it.

Senator MCCLELLAN. I see. Now let me ask you. This I think certainly would be vital and would be most important if true. At the time this case was heard, and at the time the three of you made this unanimous decision, did you have in mind then any suggestion that you would buy Brunswick stock?

Judge HAYNSWORTH. None whatever.

Senator MCCLELLAN. Had you ever heard of such a thing at that time? I mean could you have possibly at that time foreseen that 46

days later a suggestion might be made to you by your broker to invest in that particular stock?

Judge HAYNSWORTH. I could not.

Senator MCCLELLAN. Do you know, can you say whether you would have ever bought or ever become interested in it on the date which it was purchased, December 26, or any time thereafter, except and unless your broker, Mr. McCall, might have suggested to you?

Judge HAYNSWORTH. I would not. Being a judge is a full-time job. I have no time to keep up with stock investments and any opinions as to what might be appropriate or what might not be, or what might be wise to buy or not. I am completely dependent upon the advice of somebody else about it.

Senator MCCLELLAN. In other words, there was no initiative on your part, no initial decision on your part to seek to purchase this particular stock?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. It was on the advice and the suggestion of the stockbroker who had been representing you in trying to help you invest your funds?

Judge HAYNSWORTH. That is quite correct. I am not in business. I have no reason to know anything about what might be a good stock buy or what might not be one. It is simply a case when for some reason I had some funds to invest, I would consult the broker and I take his advice.

Senator MCCLELLAN. One other question. Had you not had those surplus funds, or what we might call reinvestment funds, accumulate by reason of selling some stock on which you took a loss, is there any reason to think that your broker may have suggested to you the purchase of this stock?

Judge HAYNSWORTH. Without those funds, if he had made a suggestion, I would have said I have no funds at this time. I am not interested.

Senator MCCLELLAN. So this was simply a reinvestment of funds from stocks you sold?

Judge HAYNSWORTH. That is right.

Senator MCCLELLAN. That were not proving profitable?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. Is that correct?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. This particular investment has not proven to be unduly profitable, has it?

Judge HAYNSWORTH. No, sir, it has not. Many do not.

Senator MCCLELLAN. Sir?

Judget HAYNSWORTH. Many do not.

Senator MCCLELLAN. I do not quite understand why when the motion came up for a rehearing, why it did not occur to you at that time that possibly you had this stock?

Judge HAYNSWORTH. I was aware of the fact that I did when that came up, sir. Here though at that time I was a stockholder, there was nothing I could do to wipe out the fact that I had been a stockholder during the time this case was in court.

Senator MCCLELLAN. It is understandable when you made the decision that you did not have Brunswick in mind. There was no reason

then as your testimony in the record shows, as far as I know, for you to have contemplated that you would purchase this particular stock, but I am wondering what was the proper course for you to pursue, if and when a motion for reconsideration came up, a rehearing. You could not undo the other.

Judge HAYNSWORTH. That is right.

Senator MCCLELLAN. Was it a matter of the case—had certiorari by that time already been denied?

Judge HAYNSWORTH. Yes, sir.

Senator MCCLELLAN. At the time you considered the motion for rehearing, then certiorari had been denied by the Supreme Court. Was there any question of the other judges as to whether rehearing should be granted?

Judge HAYNSWORTH. None at all. If there had been I would have granted a new hearing and brought in three new judges if anyone had the slightest doubt about it.

Senator MCCLELLAN. I can understand that some question may be raised and some criticism might be directed at you for not having disqualified yourself on the motion for rehearing, but on the decision of the case, I do not see how you can be criticized. You had no intimation then—there was nothing to suggest—you could not possibly know what you were going to do 6 weeks from then. I do not know whether you knew at that time that your investment, your insurance stock would be sold or not. Did you know that it was going to be sold?

Judge HAYNSWORTH. This was early in November. No, sir.

Senator MCCLELLAN. At the time this decision was made?

Judge HAYNSWORTH. No, sir.

Senator MCCLELLAN. Did you know then that your stock was going to be sold—that you were going to accumulate these investment funds?

Judge HAYNSWORTH. I did not, no sir.

Senator MCCLELLAN. If I understand you correctly, you are testifying that generally with respect to your funds, you do not have time to give them the personal attention to go out and seek investments, and you therefore rely upon your long-time friend and broker, who helped you follow your accounts and keep your investments sound and profitable?

Judge HAYNSWORTH. I do rely on him, sir.

Senator MCCLELLAN. He was asked a question, I believe, whether you had ever or whether you always followed his advice. I think he said he could not be sure, but he felt confident that in the majority of instances you did. Do you want to comment on that? I am trying to find out how much you have relied on him, over what period of time, and whether this whole thing was simply routine, and that there was a development afterward that has given rise to this issue here today?

Judge HAYNSWORTH. Senator, it was routine. I do not recall ever having rejected advice that he gave, except to this extent, that if he would tell me that he thought it would be a good thing to buy ABC stock, I well might say, "Arthur, I simply do not have any funds to invest now," and this would be to that extent a rejection.

Senator MCCLELLAN. There may have been times when he suggested that you invest in a given stock, when you felt like your current cash account would not justify it, is that correct?

Judge HAYNSWORTH. Yes, sir; but if I had funds to invest, and he

made a recommendation, I go to him because I think he knows a great deal more about such things than I do.

Senator McClellan. What I mean by that is you were generally relying on his counsel?

Judge Haynsworth. Yes, sir.

Senator McClellan. With respect to trying to keep your funds invested?

Judge Haynsworth. Yes, sir.

Senator McClellan. Have you ever, do you recall having ever initiated an investment with him yourself, going to him of your own initiative and saying, "Buy me some of this stock," or "Buy me some of that"? Do you recall whether you have ever done that?

Judge Haynsworth. Certainly not anything like that, sir. I may have made some inquiry sometime of him about something of which I had heard. I cannot say that I have not.

Senator McClellan. You might have consulted him—you might have inquired of him if he knew about this or that?

Judge Haynsworth. Yes, sir.

Senator McClellan. All right, Mr. Chairman.

The Chairman. You were asked about MGIC stock. What is MGIC stock?

Judge Haynsworth. This I understand to refer to MGIC Investment Co., which was in the news quite some years back, long before I had anything to do with it. Senator Hollings was the moving spirit in forming a small concern in my State known as Guaranty Investment Trust, and I bought some stock in that Guaranty Investment Trust.

A year or so ago, in a stock exchange, the stock of the Guaranty Investment Trust was acquired by MGIC Investment, and I then became a holder of MGIC stock. It came completely through this Guaranty Investment Trust.

Senator Cook. Mr. Chairman, may I put into the record if I may, Judge Haynsworth, that you acquired 3,000 shares of Guaranty Insurance Trust on August 13, 1964, and those 3,000 shares on merger were traded for 630 shares of MGIC?

Judge Haynsworth. I think that is correct, sir.

Senator Ervin. Judge, as I understand the facts, they are these: On the 10th day of November 1967 you and Judge Winter and District Judge Woodrow Wilson Jones constituted a panel before whom this case we call the *Brunswick* case came?

Judge Haynsworth. Yes, sir.

Senator Ervin. And it was from the legal standpoint a very simple case for you to decide?

Judge Haynsworth. We had no doubt about it.

Senator Ervin. And so, all three of you came to the conclusion that the landlord was entitled to a priority of rent as against these remaining assets up to the time of the tenant vacating the landlord's premises, but that thereafter the landlord had no priority of rent. Therefore, the conditional seller or the chattel mortgagor was entitled to have its claim satisfied as far as it could be satisfied out of the remaining assets after the landlord's claim was settled?

Judge Haynsworth. That is correct.

Senator ERVIN. And you never at any time since then have had any doubt about the soundness of the way you voted on November 10, 1967, to decide this case?

Judge HAYNSWORTH. No, sir; and I am told even the lawyer for the landlord agreed with us.

Senator ERVIN. Yes. Now, after that time, Judge, the result of the decision which you voted to sustain on that day was identical as far as the result of the decision was concerned with what Judge Robert W. Hemphill, the district judge who tried the case, had decided?

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. And then after that, Judge Winter wrote the opinion in the case, and he circulated the opinion not only among the panel, other members of the panel, but the other four circuit judges of the fourth circuit?

Judge HAYNSWORTH. The other five.

Senator ERVIN. I mean the other five judges.

Judge HAYNSWORTH. Yes, sir; yes, he did.

Senator ERVIN. So as a matter of fact this case was decided by the panel of three which included two circuit judges and one district judge in exactly the same way that the trial district judge had decided, and the other five circuit judges agreed that that decision was correct?

Judge HAYNSWORTH. I think that is correct.

Senator ERVIN. In other words, the nine judges that had any connection with this case were all of the same opinion, that the decision which you had made on the 10th day of November was a sound and right decision in the case?

Judge HAYNSWORTH. That is correct, sir.

Senator ERVIN. And thereafter, an application for writ of certiorari was filed asking the Supreme Court to review the case, and the Supreme Court declined to grant the writ?

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. Was there ever a formal petition for a rehearing filed with the circuit court?

Judge HAYNSWORTH. Not as such After the time had run, there was a petition to extend the time first, and that was denied, and then there was a petition to reconsider our denial of the petition to extend the time within which to file.

Senator ERVIN. What was the period of time in which the petition for rehearing was required to be filed under the rules?

Judge HAYNSWORTH. Thirty days.

Senator ERVIN. And was the motion for the extension of time made within the 30 days?

Judge HAYNSWORTH. No, sir; it was not.

Senator ERVIN. In other words, under the rules it would not have been in order for the court to consider the petition for rehearing?

Judge HAYNSWORTH. This is correct. It was not in order.

Senator ERVIN. Did you ever know of a petition for rehearing ever being granted in any case unless one of the judges that had heard the case thought it ought to be reheard, or had some serious doubts about a question?

Judge HAYNSWORTH. No, sir. Of course, you are correct when you referred to the rather forlorn hope with which these things are filed.

It is a very rare thing for one to be granted, and it is not granted in my court unless for some reason, in a panel like this, at least one judge has a strong conviction that a mistake has been made.

Senator ERVIN. And there was never a petition for rehearing granted unless one member of the court, who participated in the decision, has very serious doubts as to the validity of the decision, isn't that true?

Judge HAYNSWORTH. Well, at least that much, perhaps a little more than that.

Senator ERVIN. Yes, and at no time did any of the judges of the court, either the panel or any of the other judges of the U.S. Court of Appeals for the Fourth Circuit, express any doubt whatever about the soundness of this decision?

Judge HAYNSWORTH. None whatever.

Senator ERVIN. I do not ask any comment on this, but when Judge Winter testified, I gave my experience both as a lawyer and a judge on petitions for rehearing. I said if there is any time where love's labor is lost completely, it is filing for petition for rehearing when no judge dissents from the opinion of the court.

Judge HAYNSWORTH. I agree.

Senator HRUSKA. Will the Senator yield?

Senator ERVIN. Yes.

Senator HRUSKA. Do you know of any instance, Judge Haynsworth, where the 30 days for filing a petition for rehearing had expired, and then a motion was made to extend the time, and the filing of a motion for rehearing was out of time?

Judge HAYNSWORTH. Where it has been granted, you mean?

Senator HRUSKA. Yes, where it has been granted.

Judge HAYNSWORTH. No, I do not know, but Senator, if there were some good reason advanced for not having filed it earlier, and if some member of the court really thought a mistake had been made, I do not think we would refuse to do so on the ground it was not in time. But as Senator Ervin suggests, petitions for rehearing are very rarely granted in any event. When they are stale when they get there they have much less chance, of course, than when they are on time.

Senator COOK. Would the Senator yield?

Senator HRUSKA. Surely.

Senator COOK. On this point, judge, Judge Winter said that the motion to extend the time to file a motion for a rehearing was filed with the court on March 26. Now, under the Federal rules, you have 30 days from the time the case is handed down, not counting the day that it is handed down, in which to file a motion for a rehearing. I think the question that Senator Hruska is posing is the time expired, the 30 days expired for the litigants in this case to file a motion for a new trial on the 4th day of March. They filed on the 26th day of March, 22 days later after their time had expired. They filed a motion to extend the time for the filing of a motion for a new trial.

Now, I am sure you have had instances where litigants have filed a motion to extend within the 30-day period, which the court has readily granted, either because of records to get together, exhibits to get together, but I think the situation here is we have a situation where the litigants filed a motion to extend the time 22 days after their time had actually expired?

Judge HAYNSWORTH. That is correct; yes, sir.

Senator COOK. Thank you.

Judge HAYNSWORTH. If a motion had been made within the time to extend the time, those are routinely granted.

Senator COOK. I have a notion that if you had granted the extension of the time, 22 days after the time had actually expired for the motion to be filed for rehearing in the first place, I think if you had granted that without having a hearing, so that the plaintiff in this case had had an opportunity to protest, I think you would have quite a Donnybrook on your hands, would you not?

Judge HAYNSWORTH. I think we would have.

Senator ERVIN. Judge, I am inclined to entertain the opinion that as a matter of law that the court had no power to grant a request for an extension of time to file a petition for rehearing after the time allowed by law had expired?

Judge HAYNSWORTH. You may be correct. I really have not gone into that, and I am not prepared to express an opinion.

Senator ERVIN. Yes. You see I am inclined to believe that the winning party by that time has got what you might consider to be a vested interest in the decision that has already been made. Now, inasmuch as you did not own this stock, and did not acquire it for some weeks after you had voted on November 10, 1967, the ownership of the stock could not possibly have had any influence whatever in your original decision?

Judge HAYNSWORTH. No, sir; it could not have.

Senator ERVIN. And the decision in which you participated was not affected in any degree by the factors in the Brunswick Corp.?

Judge HAYNSWORTH. That is right.

Senator ERVIN. Judge, I spent a total of 15 years of my life as a judge, and it is perfectly understandable to me as a result of my own experience over that period of time why it never occurred to you that on the day that you decided to purchase this stock that the Brunswick Corp. had been interested in this.

My experience has been that there are two different types of cases that come before courts for determination. One of them is the routine case, where there is no complicated question and no interesting questions of fact and law is involved, and that is true of the great majority of the cases the courts hear. Judges dismiss cases of that kind from their minds.

Now, where the case involves an unusually interesting question of fact, or a very novel or intriguing question of law, I could remember the question of law that was involved in the case, but I never could remember the names of the parties who are litigants. I would hate to say at this moment how many cases I participated in deciding in 15 years I served on the bench. They run literally, counting the criminal cases tried, into thousands.

Then I sat for 6 years on the Supreme Court of North Carolina and I wrote opinions, and I concurred in other opinions, several hundreds of them, and if my very life depended upon it at this moment, I seriously doubt whether I could not tell you at this moment the names of the parties in 25, out of the thousands of cases I have tried in 15 years as a judge.

Not only is this true about judges, it is sometimes true to a lesser extent about lawyers, because I remember reading a story about Lord Russell, who was a great Irish advocate, and his clerk told him that he had a certain case coming up to be tried in a certain court on a certain day, and Lord Russell said, "Why, I never heard of that case."

The clerk said:

Well, that is rather strange, because that case was tried by you before, taken up on appeal, there was a reversal and a new trial was ordered.

Lord Russell said:

If I carried the names of all the parties of all the cases that I have been interested in in my head I would have to have a very peculiar head.

In my mind this is perfectly understandable to me. Now after you realize that the case——

Judge HAYNSWORTH. I might just inject here this occurs all the time. When I mention to a judge of my court, ask him if he recalled the case of *Smith* v. *Jones* we heard last month, the answer almost always is, "No. What was it about?"

When you tell him what it was about then it brings it back and you can talk about it. This is quite frequent.

Senator ERVIN. Right at this point I could only recall three or four cases with the titles and names of the parties to it.

Now understanding this as I do, after this opinion came through, you would have had to have the whole trail set aside and had another panel try on a case that nobody thought had any merit in it?

Judge HAYNSWORTH. I would have done that if there was any doubt at that time about it, but without it I did not think I was required to.

Senator ERVIN. I frankly regret that this event happened, but I do not think it reflects that you, like other men who are judges, like everybody, perhaps do not always remember everything that happened in the past, especially names of litigants. I think it would be one of the greatest tragedies that the American people would suffer, if a man of your legal learning and legal experience and intellectual integrity and personal integrity should be denied a seat on the Supreme Court, and that the American people be denied the benefit of your services on anything like the *Brunswick* case.

I cannot help but remember that there was another man from the fourth circuit at one time who was appointed to the Supreme Court, and his nomination was fought by the identical forces that are fighting your nomination, and this nomination was rejected by a margin of 2 votes. I refer to John J. Parker. He stayed on the circuit court, and was denied an opportunity to serve on the Supreme Court. That was a great tragedy to the American people because he was one of the great jurists this country has ever known.

I will not ask for any comment on this, but I have examined the decisions that Mr. Harris urged as showing union bias on your part, antiunion bias on your part. There are really only six of them that reached the Supreme Court outside of the *Darlington* cases.

Cases arising out of the *Darlington* litigation reached your court three times. On two of the occasions you have participated in the decision in favor of the union, so they cannot show you are biased against the union.

In the other case you joined the court in holding that the case was not right for enforcing the decision of the National Labor Relations Board. That case went to the Supreme Court of the United States and the Supreme Court held the same thing as far as the result is concerned, and sent it back for determination of other crucial issues. When those issues were determined adverse to the *Darlington* interests you joined in the decision upholding the Board.

Now, in these other seven cases, four of them were involved with just one question of law, and that is the circumstances under which cards can be used in lieu of a secret election to establish that a union represents the majority of the employees in a bargaining unit.

One of your decisions was the *Logan* case, in which your court reversed the National Labor Relations Board decision in accordance with very familiar law in existence at that time.

Evidently the parties to that case must have thought that decision was valid, because they did not appeal from it.

The other three cases were cases that went up in the *Gissel* case, they were combined with a case from another circuit and the Supreme Court did send them back, but they sent them back to the National Labor Relations Board and while there is a lot of dicta in the opinion, the truth in that case was that the case was tried before the National Labor Relations Board, and in the court of the fourth circuit, upon the law as it existed at the time the Board and the circuit court held the cases. When it was appealed to the Supreme Court of the United States, the General Counsel filed a brief, as Chief Justice Warren says, in harmony with the law as it had been in existence at the time the Labor Board and the circuit court decided the cases.

But Judge Warren held, and this is all he held, as far as the decision of the Court is concerned, that since the National Labor Relations Board had changed is rules on the oral argument of its counsel, and the new rules seemed to be satisfactory to the Supreme Court, that they would have to remand the cases to the National Labor Relations Board because it had made findings of fact in respect to the old law, and had made no findings of fact in respect to this new rule. Now maybe your court should have had prophetic power to determine what the Supreme Court was going to decide, but I do not think judges are required to be prophets. They are required to have something to do with the law, but nothing with prophesies.

Another one of those cases was one where your court was reversed on a decision made by the Supreme Court 6 days before the case was heard in the Supreme Court on a point of law that had never been passed on before, so there is another place where you need prophesies to determine what the Congress is going to do and what the Supreme Court is going to do.

Another one of the cases, *NLRB* v. *Washington Aluminum Co.*, involved seven men, the head notes in the opinion says they were nonunion men, that were assigned to work in a room they considered to be too cold. Notwithstanding the fact they had a rule in the plant that the men could not leave their work without communicating with the foreman, these men left, and they were discharged for violating the rule.

The Supreme Court held that, contrary to the circuit court that they were entitled to leave together. They were acting in concert to

protect mutual interests under the act, and I can see where, the decision of your court——

Judge HAYNSWORTH. I did not write it.

Senator ERVIN (continuing). Was perfectly valid. Now, to my mind the reasons advanced by the AFL–CIO to show union bias on your part are about the shabbiest arguments I have ever heard advanced, and I have been hearing arguments for 50-odd years now.

Judge HAYNSWORTH. Senator, I would add to that only that I think if anyone is to appraise my work in this field they should read all the opinions I wrote and not just a selected few. If they read all I wrote they would find many that are widely regarded as being prolabor.

Senator ERVIN. I can understand why the litigants would use that kind of an appraisal if they are under the conviction that all things should be decided in their favor regardless of what the facts and the law might be.

Thank you.

Senator MCCLELLAN. Senator Hart?

Senator HART. Mr. Chairman. Judge, I certainly do not want to debate Senator Ervin on those cases through you, but I listened to that testimony and it did not seem so outrageous or whatever the words were.

Senator ERVIN. I did not, either, until I read the cases.

Judge HAYNSWORTH. I do not think there is any doubt in my attempting to debate the merits or the demerits of particular cases. I only suggest that a fair appraisal I do think should take into account all opinions I have written in this field, and then one can draw his own conclusion. I will not quarrel with him whatever it is.

Senator HART. I perhaps have been at fault in the past in not spending quite as much time about the appearance of things as others have, and I am not even indicating now that merely the appearance of a violation of a code of ethics is something that should cause us to get into a great flap, unless you are that kind of person. But let me put it this way. See if this is not a fair statement, although it may be a very narrow aspect of the matter before us.

There has been a discussion here involving your responses and others' reactions that say in effect well, in November of 1967, when this *Brunswick* case came up, you did not even own any stock. That routinely, in December, you took your broker's advice and bought some. Some investments are good, some are bad. And in November the court unanimously was of the opinion that the *Brunswick* case was a simple one anyway.

Then when that motion to extend the time for leave to apply for a new trial came up, you did own stock?

Judge HAYNSWORTH. Yes, sir.

Senator HART. In Brunswick?

Judge HAYNSWORTH. Yes, sir.

Senator HART. The litigant. But there was not any real question as to what the right reaction was to the motion. Everybody agreed it should be denied. So you continued to hold the stock. I take it you do to this day?

Judge HAYNSWORTH. I do.

Senator HART. Anyone who has demonstrated sensitivity about respecting the canons of judicial ethics then has to figure out how canon

26 has been, what shall we say, ignored, dismissed, that really it is not important?

Judge HAYNSWORTH. No; I think it is important, sir, but I do not think it was violated at all, its letter or its spirit.

Senator HART. Well, what is its sprit? It says that if you are on the court, you should not invest in anything apt to be involved in litigation. That is exactly what it says. And if you go on the court and find that you have already had something that is apt to be involved in litigation, you should get rid of it.

Now, how do we describe Brunswick, something that is apt to be involved in litigation? No; it is something that has been involved.

Judge HAYNSWORTH. Yes, sir.

Senator HART. And you still hold the stock?

Judge HAYNSWORTH. Yes, sir; but if you are suggesting that a judge may not own a stock in any concern which has ever been in his court, then this is the first time I have every heard such a suggestion.

Senator HART. What does canon 26 contemplate?

Judge HAYNSWORTH. Canon 26, I think you have got to put it in perspective, sir.

Senator HART. In the perspective of this *Brunswick* case?

Judge HAYNSWORTH. I am suggesting you have to put it in the perspective of the problem that it is designed to meet, sir, and the perspective is if you have a small court, dependent upon the functioning of a single judge, let us take as an example. I do not mean this does not apply to judges on the courts of appeal, it does, but in the perspective of a single judge in a trial court that has jurisdiction in one county, and a bus company in that county is in his court every term of court he has, and he owns stock in that bus line, so that he cannot sit, and the court breaks down because he cannot function as a judge, of course he should dispose of his stock. He should not retain it. This is an extreme example but this is what canon—this is the problem the canon is concerned with.

Judges cannot be selected and paid to judge if they do not judge and cannot judge ethically. But that does not mean at all that that same trial judge owning some stock in A.T. & T. must sell his A.T. & T. stock because one time A.T. & T. gets haled into his court as a defendant. He steps aside, and lets some other judge hear the case, but the canon does not mean that he then must sell the A.T. & T. stock because one time it came into his court. That is not its purpose. It is not its intent.

As I say, I have never heard it suggested before that it should be construed as you suggest that it be. It is perfectly consistent with the statute that a judge should sit when he is required to sit, if he has a financial interest or stock holding in a case, so that he may not sit he gets out, but that does not mean that he thereupon must immediately sell that stock, not unless he is in a situation in which, because of his stock holding, he must really default in the discharge of his duty of judging.

Senator HART. I think it could have been more aptly worded if that were really what the intent was, but I am almost embarrassed to pursue this line of questioning because I am not one who has ever demonstrated any great sensitivity about the appearance of things. I

think one could say that there is an appearance here of a tendency to accept as sanctioned by canon 26 a situation that on the reading of it would suggest that it had not been intended by the section, but believe me, judge, this does not send me into any great concern. I am impressed by the fact that sometimes it appears canons are of extraordinarily great significance, and most rigid adherence shall be paid them, and other times we cannot figure out why it was, depending on the objectives——

Judge HAYNSWORTH. The canons are written in broad language. Of course, they are subject to very broad construction, and yet most judges have a feel for what they think is the purpose and the intent of canons and they attempt to comply with them. But I do not think that there is anything in this canon which requires the construction you suggest. Indeed as I indicated, I never heard any judge or any lawyer, before you did, suggest that construction.

Senator HART. Thank you.

Senator MCCLELLAN. Senator Bayh?

Senator BAYH. Thank you, Mr. Chairman.

Judge, I appreciate your patience. I would like to state again at the risk of being repetitious, I think we have raised some points here today that clearly have much to do with the concern that I have been trying to express, whether or not the investment was profitable, whether you were involved in some sinister effort at profit, whether you were in collusion with anyone.

I have never intimated that and I do not intend to. Despite the fact that it may or may not have been a unanimous decision, and the soundness of your judgment on labor cases, I personally do not think we want a labor judge. I think we want a judge who looks at labor and management decisions that come up with as objective an opinion as he can.

But I am concerned, deeply concerned, that when this decision has been made, up or down, that it be based on the highest standards we can find for someone who sets a standard for himself as well as for others that come before him. That is why I think that this may be disconcerting.

Judge HAYNSWORTH. It is not so to me, sir.

Senator BAYH. Well, you are a very patient man if it is not. It would be to me. This business we were talking about a while ago—I just want to throw a couple of these things out and be done with them. The question as I see it, I do not ask you whether you agree with your colleague this morning, the question we have before us is not whether the 30-day period for rehearing, asking for the extension of that time, had passed, which dragged on to August 26, which looks rather embarrassing, but whether as of——

Judge HAYNSWORTH. Rather what, sir?

Senator BAYH. Pardon me?

Judge HAYNSWORTH. Rather what, sir? You said it looks rather—what?

Senator BAYH. It looks, you know, you can make a substantive case or try to make one out of the fact that you are not talking about February 2. You are talking about August 6. I do not think you are.

Judge HAYNSWORTH. Embarrassing? I just wondered what you were referring to.

Senator BAYH. That you had an overly long time to control this case and consider it. I think the key question——

Judge HAYNSWORTH. There is nothing embarrassing to me, sir.

Senator BAYH. Strike the word embarrassing, peculiar, of interest to some other people.

Judge HAYNSWORTH. I do not think it is peculiar even. I will be glad to discuss what happened with you.

Senator BAYH. I think it has been adequately discussed, unless you think someone put a wrong interpretation on it. I was trying to be on your side on this point, judge.

Judge HAYNSWORTH. All right. I did not get that notion, but if you are I will be delighted.

Senator BAYH. Perhaps it seems unique to you if that were the case. It seems to me the key question we have to face here is whether from the period of November 10 through February 2 there was not time for rehearing, but whether you and your fellow judges could have repossessed that case without a rehearing and changed your mind on the subject.

Now, is there any question in your mind that there have been cases that have come before your court or other courts of appeal when between the time the case was argued and the case was finally written that judges or the court itself has changed its mind?

Judge HAYNSWORTH. Of course we do sometimes; yes, sir.

Senator BAYH. I concur in the judgment of every one here, including yourself, that the likelihood of that happening was probably very remote in this case.

Judge HAYNSWORTH. Yes, sir.

Senator BAYH. This was brought back to your attention. I share Senator Ervin's concern about this business of memory. It is very difficult, not having been in judicial robes, to see the time period from November 10 to December 20 as being long enough to do that. I can see that in some cases it would. But it was brought back to your attention then on the 27th when the opinion was circulated, is that correct? You mentioned that this did come to your attention.

Judge HAYNSWORTH. A day or so after that.

Senator BAYH. The 26th I think the stock was actually purchased. It was ordered the 26th, it was purchased the 27th, Judge Winter's opinion was circulated then.

Judge HAYNSWORTH. It was mailed on that day and I would have received it a day or so after that.

Senator BAYH. In other words, it was brought to your attention then. I think 1 or 2 days do not make any difference as far as I am concerned. Did you consider, I am just trying to think of what alternative could be followed, did you consider at all at that time disclosing this or asking the advice of your fellow judges?

Judge HAYNSWORTH. I considered what I should do and I made up my own mind. I had no doubt in the world what they would have told me if I had asked them, but I waited for Judge Jones who sent in his concurrence promptly. There was no doubt in the world about it. If at that time Judge Winter had expressed any doubt, Judge Jones had expressed any doubt, I would have scheduled the case to be reheard then. I would have ordered then that this case be reheard before

three different judges. If I was not rightly in the case, then I had wrongly consulted with them, they knew what I thought. My views may have influenced their, and I would have felt I should take them out, too.

Senator BAYH. I think you are being unduly harsh on yourself if I might say so. The fact that this case was argued in November and you did not have any notice at all of this until after 1 day—your memory was not refreshed until 1 day after this—I think to consider yourself disqualified from the original case would have been going a bit far. I was just suggesting you say perhaps, "All right, gentlemen, here is what I find. If you want to rehear this, why, fine."

I think they would have said, "Why, heavens no."

Judge HAYNSWORTH. They would have advised me to do exactly what I did do. I knew that. I did not consult them at the time. I knew what would be said. Judge Winter, of course said so today. I did not have his advice at the time because I did not ask for it, but he said today what he thought.

Senator BAYH. I think you are probably right, that he would have. Let me ask you a hypothetical question. If this is an unfair hypothetical, here again I am trying to look on into the future, in your tremendously significant post, and try to get some of these things cleared away in the past as quickly as we can. Let us take a hypothetical question, in which a case comes down on November 10, 1969. On December 20, your stockbroker orders 1,000 shares of XYZ Corp. On December 26 the stock is executed. On December 27, there is that same opinion that is circulated again. What would you do under the present circumstances of the hypothetical question today?

Judge HAYNSWORTH. Of course, I do not intend to get involved in this, because any stock I would buy now would be completely checked against undecided cases, so I have got a protection on it. I am not going to get in this predicament again.

Senator BAYH. Now, yet me ask you a question. First of all, I intended to start out at the beginning by apologizing for bringing up this *Brunswick* case in the heat of the discussion with Professor Frank——

Judge HAYNSWORTH. You need not do so.

Senator BAYH. I think if I had had the opportunity to discuss it frankly right then, although since there had been such a period of time elapsed, perhaps your memory and mine would need to be refreshed on the facts of the case, but I apologize for any embarrassment that that may have caused you.

Judge HAYNSWORTH. It has not, sir.

Senator BAYH. You are not an easily embarrassed man, I can see that.

Judge HAYNSWORTH. No, but when I have got nothing to hide, I am not embarrassed about its being brought out. Of course, I am concerned when it appears in the press with intonations that I do not like.

Senator BAYH. Yes.

Judge HAYNSWORTH. And that are not true, but as long as they are open and frank, and frankly appraised they do not embarrass me, sir.

Senator BAYH. The inferences are what would concern me, not necessarily the facts. Now let me just ask you——

Judge HAYNSWORTH. It depends on what the inferences are. Inferences are not, well——

Senator BAYH. I asked your stockbroker, Mr. McCall, about the ownership in certain cases. We had these *C. & O.* cases. Let me ask two or three questions in this general area. Have you sat on cases where you have owned a pecuniary interest? Now, the Brunswick thing, let us lay that to rest. The *C. & O.* case, 600 and how many dollars? Even I would call that insignificant in the light of your holdings. If I might take the liberty to verify that, I do not want to do so without getting your permission, but I would like if you have no objection to disclose the amount of interest that you received in 1968 from that. I am looking at your tax return. It is private and confidential.

Senator ERVIN. That is his wife's stock.

Senator BAYH. His wife's stock.

Senator ERVIN. I could tell you how much they got. They got $4 a share because I inherited five shares of that stock myself and I still have it.

Senator BAYH. How many shares do you have, 10?

Senator ERVIN. $4 a share, $1 each quarter.

Senator BAYH. I want to say that the Senator from North Carolina is accurate. He remembers the stock dividends better than he does past cases apparently.

Senator ERVIN. I do because that represents one of my largest holdings.

[Laughter.]

Senator BAYH. I should have known better than to get involved in that colloquy.

[Laughter.]

Have you sat on other cases, judge, where you had a pecuniary interest in the stock?

Judge HAYNSWORTH. Senator, ——

Senator BAYH. Before you answer this, let me suggest that a moment ago I did ask Mr. McCall about your ownership as listed in your stock portfolio, I want to disclose everything here, of Nationwide Corporation 500 shares which is listed in your information as $5,112, Nationwide Life 20 shares, $340, and I see from some information that has been given me that they have a number of subsidiaries, West Coast Life, Nationwide Life, National Casualty, Michigan Life, Northern Life, National Services, Inc. Is there any relationship to this stockholding with the cases that are listed, one of which was—first of all Mr. McCall said he bought that stock on July 8, 1964—this *Wild* v. *Nationwide Life Insurance Co.* was decided on the 23d of June 1964. I suppose theoretically when we talk about that rehearing business, I am not inclined to do that.

There was another case that was argued on September 30, 1964, decided on January 4, 1965, entitled *Nationwide Mutual Insurance Company* v. *Akers*, 340 Federal Second 150. Is there any relationship between that latter case which was argued on September 30 and decided on January 4, 1965, after the purchase of that Nationwide Corporation stock on July 8, 1964?

Judge HAYNSWORTH. What is this case, sir?

Senator BAYH. *Nationwide Mutual Insurance* v. *Akers*. Is there any relationship between that corporation and the Nationwide?

Senator COOK. What is the citation?

Senator BAYH. 340 Fed. Sec. 150. It has come to my a attention and I would like to clear it up once and for all. If Mr. McCall can be helpful to us, there are so many different names and I do not want to insinuate or infer. It could well have been another one totally unrelated.

Judge HAYNSWORTH. I do not know whether this was the case that provoked it, but I made an inquiry at one time after I became a stockholder in Nationwide about Nationwide Mutual. My information is it is a mutual. There are no stockholders in it. There may be some connection which I cannot think of with Nationwide itself, but I understand that Nationwide Mutual has no stockholders, and I am not one and Nationwide itself is not.

Senator BAYH. If it is a subsidiary of Nationwide Corp., of which you are a 500 share stockholder, then we have another problem.

Judge HAYNSWORTH. It would not be a suh if it is a mutual, sir. Mutuals have no stockholders. This is my information.

Senator BAYH. Did you say inclination or information?

Judge HAYNSWORTH. My information is that Nationwide Mutual has no stockholders.

Senator BAYH. Nationwide Mutual has no stockholders, then it is no subsidiary of Nationwide Corp., so we are talking about apples and oranges, two different cases, unrelated.

Judge HAYNSWORTH. I do not understand you. If it was a sub of Nationwide itself, it would have stock which would be owned by Nationwide, but my information is that Nationwide Mutual is a mutual concern with no stock outstanding anywhere. No one owns any stock in it, so I was informed and as I believe. I have seen no reference to it in anything that I recall seeing that I got from Nationwide.

Senator BAYH. I accept that. I appreciate your clearing that up. May I ask you to share some further thoughts about Carolina Vend-A-Matic. We got interrupted on that the other day and I hate to harken back to that business, but I must say very frankly that I am more concerned about the possible appearances that this particular situation may have than I am on the other ones that we have been discussing.

Now, as I recall when we were discussing Carolina Vend-A-Matic before, I asked you if Mr. Denis had been specifically instructed not to specify your relationship with the corporation, and I think you said yes he had.

Judge HAYNSWORTH. Yes, he had.

Senator BAYH. The thing that concerns me with this type of relationship is that someone might be instructed to do something and then take advantage of someone who is in a position of high trust without him even being any part of the action or having any idea what is going on. I think perhaps that may have indeed been the case. I notice in Dun & Bradstreet it was listed on October 18, 1963, about Carolina Vendomatic, it lists you, sir, as the first vice president. I do not know whether Mr. Denis brought that to your attention or whether he has done that customarily with the various customers of Carolina Vendomatic. This concerns me, coming from the textile industry as Mr. Denis did, and doing such a significant amount of business with the firms in the textile business, that he might use your influence without your knowing it, to further enhance the business of the corporation.

Judge HAYNSWORTH. Well, in the first place, Denis is himself a very responsible upstanding man. He is not a man of dishonor. He is not a little man. I am sure he would not do such a thing. I am sure he did not. He is not the kind of man that would.

Of course, when this question first came up, sir; it did then appear that there had been a report done in Dun & Bradstreet. This was the first time I knew anything about the fact that there had been a Dun & Bradstreet report. I was wholly unaware of it. After the investigation came up it was mentioned by Miss Eames in the letter she wrote, but this was the first information I had about it. I may say that the information it contains is inaccurate in many, many respects.

Senator BAYH. Unfortunately it is inaccurate by mentioning you as vice president, if indeed the first vice president is not accurate. I suggest that at least Dun & Bradstreet lists as the source of this Wade Denis. I am not suggesting you were the one who got Mr. Denis to do this. I am suggesting that your interest with the corporation permitted him to do it without your having any idea.

Judge HAYNSWORTH. Well, I am sure that he did not use my name in connection with any attempts to secure locations for the machines. Of course, I speak out of trust in him. I was not there with him, so that all I can say is that I believe him. I think he is worthy of belief.

Senator BAYH. I mentioned to you earlier, you were talking about this trustee relationship that you had with the pension and profit sharing.

Judge HAYNSWORTH. Yes.

Senator BAYH. And you said as I recall this was not one that was set up specifically or primarily for officers, that it was designed to benefit a broad number of the 140 employees.

Judge HAYNSWORTH. Certainly key employees among the——

Senator BAYH. Pardon me?

Judge HAYNSWORTH. Certainly the key employees among the 140. None of the directors themselves were in it.

Judge BAYH. Have you had a chance to determine the answer to a question that I raised earlier about the number of people who were covered by this trust?

Judge HAYNSWORTH. No, sir. If I was requested to look and see, I didn't make a note of it. I did not understand that I was and I have not looked into it.

Senator BAYH. I don't recall asking you to find the number. In all fairness, if I did ask I don't remember, frankly. I am concerned again about that relationship with that Vend-A-Matic Corp. That just sticks in my craw for some reason or other. Here I would imagine that the relationship with that pension fund was rather a remote one. There were what, two or three trustees involved?

Judge HAYNSWORTH. I believe there were three trustees, with very little money in it. As I reported last time my connection with that ended when stock was exchanged for ARA stock.

Senator BAYH. Are you aware whether at any time you or any of the other trustees that were handling that gave any thought to the Welfare and Pension Plan Disclosure Act, which requires that the administrator of a profit-sharing or pension plan must file a description of that plan in an annual report thereon to the Secretary of Labor?

Judge HAYNSWORTH. Senator, the——

Senator BAYH. Was it too inconsequential to come under that act? We were informed by the Department of Labor that there was no filing of it, in a letter as of September 13. Now, is there some reason why that particular retirement plan does not qualify?

Judge HAYNSWORTH. I simply do not know, sir. Those things—I means what legal advice this concern got from my former law firm and not from me. I wasn't consulted about it and I didn't know. This is the kind of thing a judge doesn't keep up with.

Senator BAYH. I understand that, Judge. I understand that, I do, but I am suggesting to you that indeed you are in a very tenuous position as trustee of that trust, if it did not file a plan. It is in violation of law and you could have found yourself a litigant in your own court. Now, that may be ridiculous and I don't think it would ever happen, because there probably weren't enough employees and enough funds but it is this type of thing wherein I think you would have to go to the *n*th degree to be careful.

Senator ERVIN. This——

Senator BAYH. Just a moment. I know here again you didn't have an idea about this thing, but also it has come to our attention that prior to the time of the merger of Carolina Vend-A-Matic with ARA, in fact I would be glad to ask the chairman if I could put in the record the entire letter that we received——

Senator ERVIN. I think you will find if you read the Disclosure Act, it applies only to management and labor unions which are engaged in interstate commerce.

Senator BAYH. Senator, they have a subsidiary in your State, the parent corporation is in South Carolina. I would suggest that that is probably interstate commerce. They operate in Georgia. Again we are nitpicking, I suppose, but it is this appearance, this appearance, the fact that the ARA Corp. before this merger had sent notice to ARA that they were investigating certain of their acquisitions. That was on February 2, 1962, and on February 5, 1962 the directive was broadened to include all of ARA's acquisitions, and then on October 22 of 1963, the bureau of restraint of trade recommended that a complaint be filed against ARA.

Now, in all honesty this complaint, the recommendation of the bureau of restraint of trade, was not the Georgia-South Carolina marketing area.

Senator ERVIN. Pardon me. The evidence is that when he took the stock in ARA it took over the pension fund, and he was not an officer of this ARA.

Senator BAYH. Senator, I am not suggesting that the judge was. I am suggesting that at the time of the merger there was a very serious matter pending before the Federal Trade Commission involving the parent company which was about to assume the stock in Carolina Vend-A-Matic.

Senator ERVIN. What has that got to do with this? This reminds me of Longfellow's lines which said:

Time is fleeting, and our hearts, though stout and brave, still, like muffled drums, are beating funeral marches to the grave.

Senator BAYH. What is that supposed to mean?

Senator ERVIN. It means that apparently we are going to be in the funeral march to the grave before we get through this proceeding.

Senator BAYH. I hope not.

I am concerned and I suppose I should ask the question if you had to do it over again whether you would still maintain that kind of relationship with Carolina Vend-A-Matic. You feel that there is absolutely nothing that was improprietous here?

Judge HAYNSWORTH. I don't know what you mean by that kind of relationship. I was a stockholder as I have said.

Senator BAYH. Stockholder, vice president, and your wife is secretary and you were on the board of directors and you own $450,000 worth of stock. You are doing business with one of the litigants.

Judge HAYNSWORTH. Well, now, Senator——

Senator BAYH. A significant amount of business of the corporation was done with textile companies, and the case involved was a textile case. This is what concerns me. It is a matter of appearance.

Judge HAYNSWORTH. Senator, I was a director until 1963. I was an inactive vice president. We have been into all of this. Your reference to textiles, though, I have not got your point yet, and I would like to talk about it a bit. I would like to correct the record. You said that all but about 12 of the 46 concerns with which Vend-A-Matic did business were in textiles. I know it was inadvertent. You don't mean to misconstrue the record. But we went through it. We counted 14 that were not textiles. We counted eight——

Senator BAYH. Excuse me. We removed two from the list. That made all but 14 of how many were the total?

Senator COOK. Let him finish his answer.

Judge HAYNSWORTH. Wait a minute. Eight we didn't know. Twenty-four you and I think are textiles, 24, but not all but 12. This would be 34 rather than 24. But I just suggest this not for the purpose of suggesting that a majority of these are not textile concerns. I do suggest, as I said last time, that I think it is probably a fair mix of the kind of industry you find in that place, and this leads me into something which I would like to say, because the suggestion has come that because Vend-A-Matic did business in textile plants as well as other kinds of plants, and because as a lawyer I had textile clients as well as other kinds of clients, that there is something wrong with my being considered for high judicial office, and I want to suggest to you that if a lawyer lives in a rural section of farm folk, if he does anything at all he is going to do business with farm people, with the doctors who take care of the sick farm people when they are sick, teachers who teach their youngsters, people who sell seed and fertilizer, with folk who service their TV sets.

Now, I don't understand that there is any reason in the world to suppose that a lawyer with that kind of connection elected to the bench should be said to be, that there should be any lifting of an eyebrow in the slightest in the fact that he sits on a case involving farmers and people that sell the farmer goods, the grocer who sells him sugar. I have never—indeed our whole system has grown up in the fact that in a community like that, local lawyers ascend the trial bench and they do try those very cases.

Now, if it is suggested because I have represented textile people among other clients that I can't sit on a textile case, then a judge in a rural section of that sort cannot sit on a case involving a farmer, and this is a new idea to me, and I suggest this as an example of the problem I am having about what you say concerns you in your own mind because I can't understand what it is that does concern you.

But the fact is that in the whole history of our courts and our tradition is that judges are drawn from active practice, and every one of them has worked with the kind of people in the community in which he lives. Now, practices can vary, of course. Now, mine, you may say, I was to some extent connected with the textile industry, and one thing you asked for was a list of the textile clients I had at the time and the proportion of the fees out of the total fees in 1957. I have that list for my old law firm. I may say what the proportion of the fees was. Twenty-eight percent of the gross fees came from textile clients in 1957.

Of course that connection was much less close, for instance, than Mr. Justice Goldberg's connection with labor, and there has been an implication here, because he did not sit on the *Darlington Mills*, case, that he took himself out of that case because of his connection and concern with labor relations, and that he just shouldn't have anything to do with such things.

Of course, this is quite untrue. He sat on some 29, I believe it was, cases involving labor relations, and some of which the AFL–CIO was a party, and others of which had filed briefs amicus curiae. And Mr. Justice Goldberg wrote opinions in some of those cases. I am not saying this to suggest that I found any basis to criticize him at all. I would find fault with him if he had not sat on such cases. I think this is the duty of a judge. But I simply mention that there has been an implication because he did not sit on one case, and I am sure he had very good reason for not sitting on that one, does not take him out of this field, and the suggestion that I think is in the back of your mind that I am still struggling to find out what it is that is concerning you in the back of your mind, in the light of the fact that Mr. Justice Goldberg, who has been mentioned as a splendid example, and I agree with it, I think he is, sits on cases which came right out of the immediate background that he had, too, and he had been much closer, of course, to this particular thing than I am.

Senator ERVIN. And it probably made him a better lawyer in that field.

Judge HAYNSWORTH. I have nothing but praise for Mr. Justice Goldberg. It has simply been mentioned here that he did one thing and suggested that I did something else and I simply suggest that that just isn't true.

Senator BAYH. I think that there must be a communication gap, because I can't get through what is worrying me, and I am concerned because what is worrying me apparently isn't worrying you, and I don't know where we go except just to change the thrust of the thing. If I misquoted the number of firms there, I though I did it in going down the list in which I asked you one at a time. Let the record stand as you amended it. We can find out what the firms were.

Judge HAYNSWORTH. This is but a slight thing.

Senator BAYH. I am not trying to be at all disputative toward the textile industry. I just cannot help but feel that—well, there is no need for opening that again.

I want to ask you one other thrust of questions here. We have had a lot of discussion back and forth about what are ethical standards for a judge.

Judge HAYNSWORTH. Yes.

Senator BAYH. I want to take you out of the picture if I could, and ask you to think about cases that will come before you on the Supreme Court, and I realize you can't be overly specific, but what do you foresee as far as those judges that are brought into question on having a conflict of interest at a lower level? How do you define ethical standards for such a judge? What criterion makes him able to make a nonbiased, an unbiased decision? How do you define a substantial interest? This is one idea that has been knocked around. The Rehnquist treatise, did you read Assistant Attorney General Rehnquist's treatise on the duty to sit and the duty not to sit? Do you concur in that? I won't ask a whole series of questions, but I would just like to have your thoughts on this area if you please.

Judge HAYNSWORTH. This, of course, is undefined under the statute. It is there, and each judge I think has to make up his mind for himself what is substantial and what is not. Senator, there is nothing to which I can turn where this has been discussed at large which would give great guide to a judge anywhere. It might be helpful if someone would undertake a discussion at large of this, but I know of nowhere that I could put my hands on it. I don't know where I could enlighten you.

The only thing that I know——

Senator BAYH. I don't want any discussion. I would like to have your thoughts on it.

Judge HAYNSWORTH. The only thing that I know that sometimes I feel quite strongly that if it is substantial or if it is not, if there were doubt about it, judges should talk about such things.

Senator BAYH. You feel we have some difference of opinion as to what the positions of canons of ethics. the legal canons of ethics and the ABA interpretation, the opinions thereof—would you care to give us your opinion as to whether you think the canons of ethics should be taken into consideration in judging this standard?

Judge HAYNSWORTH. Oh, of course I do.

Senator BAYH. Are you familiar with the *Commonwealth Coating* case, the 1968 case which we discussed back and forth with Professor Frank here?

Judge HAYNSWORTH. In general. I wasn't here but in general I know about that case.

Senator BAYH. Are you in a position to suggest whether you think this was the right standard that the court set?

Judge HAYNSWORTH. Yes, in the context of that case, yes, I think so.

Senator BAYH. I will just quote from one part because we have some dispute about whether the canons of ethics are in there. It seems to me we have statutes that must be considered in determining what ethical standards should be reached, but in the final analysis of the canons of ethics it is the way the court interprets these. The Court

says in the last paragraph or two of the case, it quotes from, I think, 33, social relations, in which it says:

A judge should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conducts.

And then it goes on and in its next to the last sentence says:

This rule of arbitration and this canon of judicial ethics rests on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.

Now, do you concur that that is a pretty good standard to set?

Judge HAYNSWORTH. I do.

Senator BAYH. Well, you have been very kind. My concern, as I think I have intimated before, goes beyond you personally or the Fourth Circuit. My concern goes to the fact that if you are confirmed it will give you the opportunity to set national policies in this area. I know you cannot decide or suggest or make opinions on pending cases. I think it is rather ironic that just last week there was a case that was submitted to the Supreme Court seeking certiorari entitled *Brown* versus *Commercial Bank of Peoria*. It involved a case in Illinois in which three judges were stockholders in banks and directors of banks, not the bank in the case but on banks in general, and the question involves whether or not a bank indeed has a fiduciary relationship when dealing with an old senile lady in drafting her will, and the lower court said there was no such fiduciary relationship, and you, sir, are going to have the opportunity, if you are confirmed—and I suggest you probably will be—if you are confirmed you are going to have to vote as to whether certiorari is denied or whether it is granted. In this effort people of this country are looking to you, looking to me, they are looking to all of us, to seek a standard of ethics that is perhaps higher than is humanly possible, but I think we need to do our very best. I appreciate the fact that you would agree with that final or next to the last sentence, because it seems to me we are talking about appearance of bias, appearance that you and indeed those who come before committees of Congress will receive justice and fair treatment. Not just that you will receive justice but it is the appearance of justice. I appreciate your answering the questions.

Judge HAYNSWORTH. Thank you, sir.

Senator TYDINGS. When Judge Winter circulated the Brunswick opinion in the latter part of December, that was the first time you realized that you had a stock ownership in the company, did you consider discussing your ownership of the Brunswick stock with Judge Winter or the other judge on the panel?

Judge HAYNSWORTH. I did not, as I informed Senator Bayh. I took it upon myself, but I have no doubt what answer I would have gotten if I had. It is the same as he stated today, so that sometimes we discuss such things among ourselves, sir, and other times that we don't. I had no doubt in the world but what Judge Winter's response would have been when it came up, it was his immediate response today, but I did not consult him then.

Senator TYDINGS. Another question. ABA in opinion No. 170, which was discussed here once or twice before earlier today, reads that a

judge who is a stockholder in a corporation which is a party to litigation pending in his court may not with propriety "perform any act in relation to such litigation involving the exercise of judicial discretion."

Now, would you give us your views on the ABA opinion 170, and would you discuss its application with respect to the *Brunswick* case and the C and O matter?

Judge HAYNSWORTH. I endorse what Judge Winter said when he appeared earlier today. Essentially I think we are controlled by the statute, which says in effect as I read the statute that we must, that a judge must not sit if he has a substantial interest in the case, and with the strong implication, and it has been construed that way, that he must sit if he does not.

In connection with stockholdings, my own idea is that for the sake of appearances, as Senator Bayh would say, to avoid that, if there is any stockholding, a judge if he can should take himself out. But that doesn't mean that in a very slight case with a very slight stockholding, a judge to my mind commits an impropriety if he goes on and acts. I talk here in terms of a judge who has a stock interest in connection with a case where the result would mean that the worth of his stock potentially may have an effect that could be measured in mills.

There is no doubt in my mind and I am sure there is no doubt in yours that the judges we have are simply not affected by such things. This we know. And as long as it is known and accepted on that basis, I can't get very exercised about the fact that a judge might sit in a case where his interests are that insubstantial under the statute.

At the same time I think the canon under this view as it is drawn if it is too restrictive should be in the forefront of the mind of a judge when he decides whether or not to sit. I do think he should take it into account.

Senator TYDINGS. I have no further questions.

Senator ERVIN. I understand you were asking about the ABA.

Senator TYDINGS. I asked about an ABA opinion.

Senator ERVIN. Involving discretion?

Senator TYDINGS. ABA Opinion 170.

Senator ERVIN. Involving matters of discretion, isn't it?

Senator TYDINGS. No, it just states as I read it, that a judge who is a stockholder in a corporation when it is a party to litigation pending in a court "may not with propriety perform any act in relation to such litigation involving the exercise of judicial discretion." That is just an American Bar Association official opinion.

Senator ERVIN. Yes. I don't believe that is quite germane, because these cases were not a matter of discretion. The *Brunswick* case was a matter of what the law and the facts showed.

Senator TYDINGS. I wasn't trying to say they were or weren't. I asked the judge to discuss the official opinion with respect to his role in the *Brunswick* case, and the *C and O* case.

Judge HAYNSWORTH. Senator, with respect to my role in the *Brunswick* case, there can be no doubt in my mind that the case did not involve much. My stock interest and what was involved in the case should have taken me out of the case, if you are asking me in those terms, yes, I would not have sat in it if I had owned the stock before

the case was heard. I would have removed myself later, if there had been any controversy about it at all, applying this 190 whatever it is.

While you can say that you have discretion to withhold your name from what was done, pursuant to the agreement or not, it is not really a judicial act, when all you are saying is this is the proper execution by Judge Winter of what we agreed upon in November. This is the way I look upon it.

Senator BAYH. Will the Senator yield just a moment?

Senator TYDINGS. Yes.

Senator BAYH. I want to just touch on this again. I am not going to be the devil's advocate, but in light of your concurrence in the finding in Commonwealth Coating, I won't cite it again, but it goes pretty far to suggest appearance is what we are after. I go back to my concern about its appearance and all the things that have been dislosed which are not embarrassing about Carolina Vene-A-Matic. It seems to me we have a much more—or an equally—fleeting relationship in Coating. In fact I think we have 1 percent of the business involving the person in question, whereas the Carolina interest with the Milliken firm was about 3 percent. That is what concerns me about that particular thing—next to the last sentence of what the Supreme Court said.

Judge HAYNSWORTH. But in that case, I haven't read it in quite some time, and I may be off, perhaps I should read it again, but as I recall, there was a code or a convention which required a prospective arbitrator to disclose certain things which would be used by the parties themselves to decide whether or not they would use them. This man did not make such disclosure. In fact, he had been serving as a consultant to one of the parties in that case, and I believe with respect to the very construction out of which this controversy arose.

In terms of a code of disclosure to permit some people to select who he will be, if he doesn't say what it is, and the parties are deprived of the chance of knowing before they agree upon him, why, this is I believe what the case involved.

Senator BAYH. I don't expect you to know all the cases. I have read this only a couple of times here, but Professor Frank felt similarly that the American Arbitration Association ruling 18 made the statement, and I pointed it out to him specifically that it said in the court, in its decision: "While not controlling this case," they considered the impact but they get right back to the canons of ethics, No. 33, and they hit very hard not only on the ruling but the canons of ethics and that the basic principle must not only be unbiased but must avoid any appearance of bias. This is what concerns me.

Judge HAYNSWORTH. I agree completely with your statement about the appearance of being unbiased, but I still don't know why a judge who has represented farm folks, and people who sell to farm folk, if he has got an interest in a store that sells him seed and fertilizer cannot sit on a case involving farmers.

Senator BAYH. Judge, are you suggesting that there is a real comparison between representing a group of farmers and having a significant proprietary interest in a company that is doing business with the litigant? I think you are going a bit far there, aren't you, with the di-

rector, the vice presidential relationship? I think you sort of tear down everything you have built up here.

Judge HAYNSWORTH. Again I think I am lost in your thought. You are talking about appearances of things, and I agree with you. I am concerned about them. I still don't think that what I did violated that principle.

Senator BAYH. Thank you.

Senator MCCLELLAN. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Chairman, the South Carolina Bar Association is thoroughly behind Judge Haynsworth and I have a resolution here that was drawn by the members of Judge Haynsworth's county bar association which paid him a sterling tribute. I ask unanimous consent that the resolution be placed in the record.

Senator MCCLELLAN. Without objection it is so ordered.

(The resolution referred to follows:)

RESOLUTION UNANIMOUSLY ADOPTED BY THE GREENVILLE COUNTY BAR ASSOCIATION AT A SPECIAL MEETING HELD ON SEPTEMBER 2, 1969

Whereas, the President of the United States has singularly honored the State of South Carolina and the City and County of Greenville in the appointment of the Honorable Clement Furman Haynsworth, Chief Judge of the United States Court of Appeals for the Fourth Circuit, as an Associate Justice of the Supreme Court of the United States; and

Whereas, by said appointment, the President has at the same time enhanced the dignity and respect for the Court in the minds of the general public; and

Whereas, by his dedicated and pertinacious pursuit of the process of reason in the disposition of cases coming before him during his tenure on the Court of Appeals, Judge Haynsworth has made a contribution to our jurisprudence rarely equaled in the life of that court; and

Whereas, Judge Haynsworth has the integrity, keen intellect and judicial temperament which qualify him to function on the supreme bench according to its best historic tradition, these attributes being indispensable to administration of equal justice under the law; and

Whereas, Judge Haynsworth's elevation to the Supreme Court of the United States will end one illustrious chapter in his life and be but the commencement of another,

Now, therefore, be it resolved That we, the members of the Greenville County Bar Association, highly commend the President of the United States for his wisdom in selecting a learned former fellow member of the Greenville Bar for service on the Supreme Court of our nation; and

Be it further resolved That we, in this body assembled, heartily recommend Judge Haynsworth to the Senate of the United States for confirmation of this appointment, with the hope that it will give its advice and consent speedily so that Judge Haynsworth may take his seat on that august body promptly and continue his diligent and patriotic service to the government under which we are privileged to live.

Let a copy of this Resolution be sent by the Secretary to the President of the United States, the Attorney General of the United States, the Chairman of the Judiciary Committee of the Senate, to the senior and junior United States Senators from South Carolina and to Judge Haynsworth.

Senator THURMOND. I also ask that there be placed in the record a resolution by the Counties Association in South Carolina which passed a resolution at its conference in Charleston on August 30, 1969.

Senator MCCLELLAN. Without objection that will be placed in the record.

(The resolution referred to follows:)

RESOLUTION

Whereas, The Senate of the United States has before it for consideration the nomination of the Honorable Clement Furman Haynsworth Jr., Chief Judge of the Fourth Circuit United States Court of Appeals, to be an Associate Justice of the Supreme Court of the United States and,

Whereas, Judge Haynsworth is an outstanding South Carolinian who has served with distinction, ability and impartiality as a member of the United States Circuit Court of Appeals, and,

Whereas, his record of service as a lawyer and as a jurist has proven very clearly that he is eminately qualified for the Associate Judgeship of the Supreme Court of the United States to which he has been nominated by the President of the United States,

Now, therefore, be it resolved that this Convention of the South Carolina Association of Counties goes on record as endorsing the nomination of the Honorable Clement Furman Haynsworth Jr. expressing pride and satisfaction in his nomination and as urging the Senate of the United States to approve and confirm his appointment to the high position to which he has been called.

Adopted this 30th day of August, 1969.

[S] J. EUGENE KLUGH,
Secretary.

Attest:

[S] JOHN PATE.

Senator THURMOND. This resolution states in part that "his record of service as a lawyer and as a jurist has proven very clearly that he is eminently qualified for the Associate Justiceship of the Supreme Court of the United States to which he has been nominated by the President of the United States."

Mr. Chairman, I just want to say that the people of South Carolina are solidly behind Judge Haynsworth. They know him to be a man of unquestioned character and integrity, of thorough devotion to duty, faithful to the trust that is reposed to him.

I have no questions.

Senator MCCLELLAN. Senator Cook.

Senator COOK. Judge Haynsworth, you were one of the incorporators of Carolina Vend-A-Matic; were you not?

Judge HAYNSWORTH. Yes, I was.

Senator COOK. And as a lawyer who helped create a corporation and watched it grow, you were exceedingly proud of it; weren't you?

Judge HAYNSWORTH. Yes, I was; yes, sir.

Senator COOK. And the fact that those people that functioned in that business and your activity in it, the fact that your invesment grew was one of those things that would make any individual in this Nation proud; was it not?

Judge HAYNSWORTH. I was quite proud, though I may say right here until it was sold I had no idea it was worth as much as it was. No one knew it was going to fetch the amount that it did. Indeed when I offered to sell my stock to the other stockholders, I would have accepted a great deal less than I wound up receiving, but it had grown greatly. I knew it, and I was proud of it; yes, sir.

Senator COOK. And might I suggest that in regard to the questioning by Senator Bayh, the fact that Mr. Dennis informed the Dun & Bradstreet people that you were the first vice president, if the books and records of the corporation showed you to be that, he would not have been telling Dun & Bradstreet the truth if he had eliminated your name as having been listed as first vice president; would he?

Judge HAYNSWORTH. I don't know where they got the information. I really don't know anything about that. But I suppose at the time the records show that I was not the first but a vice president.

Senator COOK. And had he not shown them that, because the corporate records exactly showed that you were, he would not have been telling Dun & Bradstreet the truth as to who the officers were; would he?

Judge HAYNSWORTH. No, sir; he would not.

Senator COOK. As a matter of fact, Mr. Harris testified that when the union was notified on February 20 that you were a vice president of the corporation, he testified that they received the information that in fact you were by reason of a Dun & Bradstreet report, so there is no question about that, and you made no effort to deny it; is that correct?

Judge HAYNSWORTH. No; I have not.

Senator COOK. Now, when it comes to being prejudiced, Judge Haynsworth, I have got to say that I think everybody around this table is prejudiced. I am prejudiced toward everybody in this Commonwealth of Kentucky who saw fit to send me to the U.S. Senate, so I expect if I were to take a position of high judicial responsibility, someone might say that apparently I wasn't supposed to sit on any cases that might come in the name of the Commonwealth of Kentucky. So let's get to the Brunswick situation.

You wish you had never heard of the Brunswick Corp. stock; don't you?

Judge HAYNSWORTH. I do indeed.

Senator COOK. And the fact that you own 1,000 shares of Brunswick has caused a great deal of turmoil to you; has it not?

Judge HAYNSWORTH. Yes; certainly it has.

Senator COOK. We are all aware of that. Judge, coming out of the elevator when we came back for the afternoon hearing someone from the press was on the elevator and made some remark about they are having a big argument between the statutes and the canons. Well, now, the statutory law is what prevails in this Nation; is it not?

Judge HAYNSWORTH. It is, sir.

Senator COOK. And the statutes of the United States in regard to whether you should or should not sit are not by canon 29, not by canon 26, although they are extremely important, and they are vitally important to you and to me, but the law that prescribes whether you should or should not is found in 28 U.S.C. 455; is not?

Judge HAYNSWORTH. It is. Of course I don't find any inconsistency really. The canons themselves I think ought to be construed in keeping with the statute.

Senator COOK. And that statute says that any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest?

Judge HAYNSWORTH. Yes; it does.

Senator COOK. Now, let's get back to the fact that there were 22 days that lapsed between filing for a motion for a new trial and the fact that the litigants on the 26th of March filed a petition for extension of time. I would like to read into the record the rules. It is rule 34, section 2, and it reads as follows:

Whenever any justice of this court is empowered by law or under any provisions of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended.

So if they fail to file with the clerk within that time, it was not timely, is that correct?

Judge HAYNSWORTH. That is correct.

Senator COOK. Now, the motion and subsequent motions continued in your court even though the case went up to the Supreme Court, because there was still a pending motion in your court in August, and yet the writ of certiorari was denied on June 3, is that correct?

Judge HAYNSWORTH. The last motion that they filed, the motion to reconsider denial of the motion to extend the time got misplaced. I don't know whether it was in the clerks' office or mine, but somewhere it was misplaced, and for a couple of months I don't know where it was, but it was found, and then we acted upon it.

Senator COOK. Judge, let me ask you this. In regard to the Senator's remarks about the interest in Carolina Vend-A-Matic, except for the fact that Carolina Vend-A-Matic did business with affiliates of Deering Milliken, you had no interest in Deering Milliken whatsoever?

Judge HAYNSWORTH. I did not.

Senator COOK. You have not to this day?

Judge HAYNSWORTH. No, sir.

Senator COOK. Mr. Chairman, I might suggest that many things that the Senator from Indiana has said I agree wholeheartedly with, but I am afraid in this instance, and I only say this as a member of this committee and as a lawyer, that the standards that somehow or other are being proposed I am afraid are standards that no nominee to the Supreme Court of the United States in the future will ever be able to meet.

I am afraid that if we say to the judges of this Nation, or to the lawyers, because obviously in 1956, and when you started Carolina Vend-A-Matic you had no knowledge that you would even be asked to sit on the Fourth Circuit——

Judge HAYNSWORTH. No, sir.

Senator COOK. And obviously by the farthest stretch of your imagination you never dreamed that you would be asked to be a nominee to the Supreme Court of the United States?

Judge HAYNSWORTH. No, sir, I did not.

Senator COOK. You were by the testimony of your fellow lawyers and by the affidavits that have been presented, you were an outstanding lawyer at the bar. You represented your clients and you represented those clients who wanted you to represent them, and it would be very difficult for a major law firm in your community in South Carolina who represented corporations not to represent a number of textile firms; wouldn't it?

Judge HAYNSWORTH. Oh, yes. Well, it is a textile section. If you have corporate clients you are going to have textile clients.

Senator COOK. And I might suggest, Judge Haynsworth, that when it was suggested that you had some $16,000 to buy this stock, I saw a lot of oohs and ahs from the first two tables on each side of the aisle. I might suggest that the people on each side of the aisle in the

first two tables, they would probably get larger raises if the presidents of their corporations didn't have those big accounts so they might buy stock periodically.

Thank you, Mr. Chairman.

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. This reminds me of the story I heard a lawyer in Asheville tell to my father. Many years ago there was a vacancy on the Fourth Circuit Court of Appeals. Mr. Tom Rollins was in our law office and my father said, "Tom, I would like to see you appointed to that place. I can get the bar head to endorse you."

He said he appreciated it "but I am not going to let you do it because I remember a story about a friend of mine down in Alabama that was recommended by a bar group for a Federal judgeship, and he disappeared a few days later. They tried to find out the cause of his disappearance, but the only thing they ever found was that right after the President announced his nomination he got a telegram saying: "Flee at once, all is discovered."

I am frank to state I appreciate what Tom Rollins meant. I think if I was ever offered an appointment I would flee at once.

Also, I expect you feel about the Brunswick stock like the story they tell down in North Carolina about the fellow that got to be administrator of his father's estate and he got involved in all kinds of controversies and litigations. He finally confessed that "I have had so much trouble as administrator of my father, I am almost sorry the old man died."

I guess you are sorry, too.

Senator COOK. Mr. Chairman, there is just one thing I would like to put into the record.

Judge Haynsworth, I will be very frank with you. I was far more disturbed about the *Brunswick* case that I have ever been about Carolina Vend-A-Matic. I thought there was a serious question. And I must confess to you that I wish it had not occurred and I expect you wish it had not occurred either.

Judge HAYNSWORTH. I do, too, Senator.

Senator COOK. In regard to this real problem that I had, I contacted one whom I consider to be one of the finest lawyers in the Commonwealth of Kentucky, Mr. John Tarrant, of the law firm of Bullitt, Dawson and Tarrant, which probably until recently was the largest law firm in the Commonwealth of Kentucky.

I had a long talk with him and he wrote to me and I would like to put this letter into the record if you do not mind, Mr. Chairman.

He read and got some of the other lawyers in that firm to read Brunswick versus Long, and I will only read you the last three paragraphs or four.

Beach also asserted a rather ridiculous claim for punitive damages in the sum of $50,000.

The very maximum amount involved (including the ridiculous $50,000) was $140,000.

Whether Brunswick won or lost the case could not possibly have made any material difference to its stockholders. No great principle of law was involved and such as it was, it was confined purely to South Carolina law which was controlling on the Federal Court.

Brunswick had outstanding 18,479,969 shares of common stock. If the full $90,000 of future rents for all seven years unexpired term of the lease had been

recovered by Beach, it would have only received $90,000 which is less than ½ cent per share of Brunswick's 18,479,969 shares of stock outstanding. This would translate into ½ of 1 cent per share on the 1,000 shares of stock owned by Judge Haynsworth, or the grand total of $5.00.

If a claim of conflict of interest is asserted in connection with this decision, I think it is the most ridiculous position I ever heard of. Any man of intellectual integrity should be ashamed to raise it.

Best regards.

Sincerely.

JOHN E. TARRANT.

I would like to put that in the record as from one I consider one of the finest lawyers in the United States.

The CHAIRMAN. It will be admitted.

(The letter referred to follows:)

BULLITT, DAWSON & TARRANT,
Louisville, Ky., September 19, 1969.

Senator MARLOW W. COOK,
Senate Office Building,
Washington, D.C.

DEAR MARLOW: I have checked the case of *Brunswick Corp.* v. *Long*, 392 F.2d 337.

As you know, in essence this was a squabble between the Brunswick Corp. (which had sold to the Floyd Corporation ten repossessed bowling lanes and pin setters) and the Beach Corp. (which constructed and leased to the Floyd Corporation a building in which the howling alleys were installed).

Beach claimed a landlord's lien on the bowling alleys to secure the payment of a small amount of past due rents, which Brunswick conceded, and some $90,000 of future rental (7/10ths of $128,000) under a ten-year lease, three years of which had expired. Brunswick claimed priority over this $90,000 of unaccrued future rental by virtue of a conditional sales contract lien.

Beach's lease had been recorded before Brunswick's conditional sales contract was recorded.

The United States District Court held under South Carolina law that Beach's claim for future rent was inferior to Brunswick's claim for the purchase price of the alleys.

The Court of Appeals for the Fourth Circuit unanimously affirmed the District Court. Judge Winter wrote the opinion; Judge Jones and Judge Haynsworth concurred in it.

Beach also asserted a rather ridiculous claim for punitive damages in the sum of $50,000.

The very maximum amount involved (including the ridiculous $50,000) was $140,000.

Whether Brunswick won or lost the case could not possibly have made any material difference to its stockholders. No great principle of law was involved and such as it was, it was confined purely to South Carolina law which was controlling on the Federal Court.

Brunswick had outstanding 18,479,969 shares of common stock. If the full $90,000 of future rents for all seven years unexpired term of the lease had been recovered by Beach, it would have only received $90,000 which is less than ½¢ per share of Brunswick's 18,479,969 shares of stock outstanding. This would translate into ½ of 1¢ per share on the 1,000 shares of stock owned by Judge Haynswortb, or the grand total of $5.00.

If a claim of conflict of interest is asserted in connection with this decision, I think it is the most ridiculous position I ever heard of. Any man of intellectual integrity should be ashamed to raise it.

Best regards.

Sincerely,

JOHN E. TARRANT.

P.S. I enclose Value Line analysis of Brunswick.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

I received a telegram and a letter from Edith Throckmorton, Mont-

gomery County Branch of the National Association for the Advancement of Colored People.

I request that these be made a part of the record at this hearing.

The CHAIRMAN. It will be admitted.

(The letter referred to follows:)

MONTGOMERY COUNTY BRANCH AND YOUTH COUNCIL,
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Rockville, Md., August 25, 1969.

Senator CHARLES MAC. MATHIAS,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MATHIAS: In our telegram of August 21, 1969 the Montgomery County Branch of the NAACP urged you to vote against the elevation of Judge Clement F. Haynsworth to the United States Supreme Court.

We reaffirm our vigorous opposition to his appointment. Judge Haynsworth's record on civil rights is regressive and tends to intensify racial tensions. An examination of his voting record since 1954 in numerous civil rights cases involving racial discrimination in the desegregation of schools, in services in hospitals, in the use of swimming pools, and decisions in labor disputes, Judge Haynsworth has been on the side of resistance.

The facts lead us to believe that his vote on the Supreme Court would obstruct and hinder the progress of, and/or reverse what has been done in the forward movement for racial equality and equal opportunity for all Americans.

Finally, we ask that you have the telegram and this letter *read into the Congressional Record.*

Sincerely,

EDITH THROCKMORTON, *President.*

Senator MATHIAS. Thank you, Mr. Chairman.

Mr. Chairman, it occurs to me that this committee finds itself between two very serious dangers at this point in this hearing. We have the constitutional responsibility to insure that those people nominated by the President for membership on the Supreme Court are in every way the kind of people who will inspire confidence and trust in our judicial system. And whenever Pandora's box is opened, we have to run around and track down all of the difficulties and troubles that are released to the satisfaction of ourselves and of the entire country.

But there are other questions at stake here as Senator Cook has just commented. There is a deterrent factor that I think we have to consider, and that is how our actions reflect on the future. We want to be sufficiently strict that we make it perfectly clear that no one without the cleanest kind of record is going to pass this test. But I don't think we want to reverse one of the great traditions of the American bar, the tradition of the independence of the judiciary, which was established with so much difficulty by our ancestors as long ago as Edward Coke in his struggle with the executive in England.

I wouldn't suggest that the few questions that I want to ask, that I am trying to set up the kind of tests which make a judge, any judge in the United States, feel that he is going to be answerable in some other place for the honest judicial opinions that he has given in his court, which are consistent with his conscience.

Judge Haynsworth, I think we have reached the stage in dealing with Carolina Vend-A-Matic where it has become a subjective matter. We all know the objective facts. What is important now, reflected into the future, into the period of your service on the Supreme Court, is what was in your mind, and that is pretty hard to find out. That is like proving damages in a back injury case. It is pretty difficult.

Would you describe just what went on when there was a directors' meeting of Carolina Vend-A-Matic? Where did you meet and what went on at those meetings?

Judge HAYNSWORTH. We met at lunch as a rule.

Senator MATHIAS. Where?

Judge HAYNSWORTH. Sometimes at a hotel. It changed from time to time. We met on a certain day of a week in a certain place until that changed.

Senator MATHIAS. What was the relationship between the directors? They were all close friends?

Judge HAYNSWORTH. We were all close friends. We talked on all kinds of things and sometimes we wouldn't even mention Vend-A-Matic. When there was something to talk about it we would, but the meetings themselves were extremely informal.

Senator MATHIAS. Did the manager of the company describe prospects for new business to the directors?

Judge HAYNSWORTH. I am sure on occasion he did, or he would mention the fact that a new location had been obtained somewhere.

Senator MATHIAS. In the case of Deering Milliken did he ever describe any prospective new business, in the sense that they might provide a site for machines?

Judge HAYNSWORTH. I am sure he never mentioned it in those terms. Now I don't know that I ever heard him say that Magnolia was a prospect or that he had an installation there, but I just don't know.

Senator MATHIAS. When he would bid for a location, would he be authorized by the directors to make such a bid, or did he have plenary authority to act for the company?

Judge HAYNSWORTH. He did that on his own.

Senator MATHIAS. The board of directors did not individually act on those?

Judge HAYNSWORTH. We looked to him for overall financial results only.

Senator MATHIAS. Have you ever had occasion to advise either counsel or the parties to a proceeding of some personal interest of yours that might or might not affect your feeling about your sitting on a case?

Judge HAYNSWORTH. Senator, I cannot recall an instance in which I, myself, have had such an interest that it was brought up, but members of my court have reported to me, and then I brought that to the attention of the counsel, but I don't recall an instance in which it was my interest that was the one involved. I have done this on behalf of members of my court.

Senator MATHIAS. It is a hypothetical question, to which of course there can only be a hypothetical answer, but had you been a stockholder of Brunswick at the beginning of that hearing——

Judge HAYNSWORTH. I would not have sat on it.

Senator MATHIAS. You would not have sat on it at all?

Judge HAYNSWORTH. I would not have sat on it.

Senator MATHIAS. You consider that your interest was substantial, then?

Judge HAYNSWORTH. Yes, I do, without question, though it was not in the outcome in terms of that, but much more substantial than I think a judge should run the risk of being critized.

Senator MATHIAS. As I recall the course of events from Judge Winter here this morning, there were two motions before the court which grew out of the *Brunswick* case, which did come in after your acquisition of the Brunswick stock. Were these motions discretionary in your judgment?

Judge HAYNSWORTH. No, sir. The first one, of course, was a proposal to extend the time to file a petition. It was filed well after the time had expired, and the later one which said the same thing.

This would be denied in I don't know how large a proportion it would be, but it would take something like a showing that the lawyer was in an auto wreck and had been in the hospital unconscious, for 30-odd days, and he is now conscious, and it appears that there was a fact of which we were unaware, and that that fact would change the result. Yes, we could find a way to do something about it.

Senator MATHIAS. And only to that extent did you consider it to be a discretionary matter in which the court would exercise its——

Judge HAYNSWORTH. This motion was under no circumstances of the kind that any judge of the court ever thought should be granted.

Senator MATHIAS. And was it that circumstance which made you feel that it was not necessary to advice either your brothers on the bench or the counsel or the parties of the change in your own position?

Judge HAYNSWORTH. I think the alternative was to have the case completely reheard before three new judges, and it seemed a very poor alternate.

Senator MATHIAS. What changes did you make in Judge Winter's draft opinion which was submitted to you?

Judge HAYNSWORTH. I, myself, made none, but one of my law clerks that year was a local boy, and he knew something about this local proceeding for the repossession of personal estate. He read it and he thought that Judge Winter's use of some terms in connection with that statutory thing were inexact, and he made a little memo to that effect.

Judge Winter, himself, this was brand new to him, the procedure part of it. I made no memo at all to him. I handed him what my law clerk had done, and told him if he wanted to use it, fine, if he didn't, that was fine, too. I did not condition anything I did on his use of what this law clerk brought up. The changes that he made were purely technical corrections that had no effect on the reasoning or the conclusion of the opinion.

Senator MATHIAS. One of those cases sounds like the voice of Esau and the hand of Jacob.

Now, had there been a system of judicial disclosure—and let me say that I have advocated that there be Congressional disclosure. Perhaps there should be a uniform rule throughout the Federal Government.

Had there been disclosure in this case, had everyone been aware of the facts, really a lot that has happened here in the last couple of weeks would not have occurred, because we would all have been advised in advance of the situation. What is your view of this, because that is going to be one of the matters which will face the Supreme Court in the coming months?

Judge HAYNSWORTH. I have appeared before the Subcommittee on Improvements in Judicial Machinery in support of a requirement that

the judges make financial disclosure. The particular proposal that we had in mind then was a requirement that each judge, each year, file a report with the Judicial Conference of the United States. It was contemplated that it would be made available there to a Commission of Judges who could inquire into judicial fitness, and to this committee.

Senator MATHIAS. When did you make that recommendation? Do you remember the date?

Judge HAYNSWORTH. No, Senator, I don't, but I believe it was last May. Senator Tydings would know or the record would show, but I believe it may have been earlier last spring. It was before the Judicial Conference in June, before the question arose.

Senator MATHIAS. That information, of course, would only be available to the conference and to official circles. It would not be available to parties who are counsel?

Judge HAYNSWORTH. It would not be unless the Judicial Conference itself released it, and there was a provision for its release, I have been in support of that, and I have been asked too if I were a Justice of the Supreme Court, would I comply with any requirement that the Conference might adopt with respect to circuit court judges and district judges, and of course I would.

Senator MATHIAS. Judge, there have been claims made that you have demonstrated bias in some cases, and I again want to reiterate that I don't believe that a judge should have to answer elsewhere for his honest decisions in court, but I think if you take a line of cases—it is late, you have been here a long time, I don't want to prolong this, but perhaps the easiest and quickest way for me to do this is to ask you a series of quick questions.

They are all on matters which are on the record, but I think in order to get them into this record, we have to do it that way, through leading questions. I think it is the efficient way to do it.

For instance, in the case *Coppeidge* v. *Franklin County Board of Education*, in which I believe you wrote the opinion——

Judge HAYNSWORTH. Two opinions.

Senator MATHIAS. In essence the holding was, and this was prior to the Supreme Court's ruling in the case, in essence the ruling was that freedom of choice plans, when accompanied by acts of violence and instances of coercion were simply illusory, and that a much higher standard should be required of local school boards in dealing with the racial segregation question.

Judge HAYNSWORTH. I think so, yes.

Senator MATHIAS. That is reducing a complicated situation to a minimum of words. In case of *Cummings* v. *City of Charleston*, you participated in the case?

Judge HAYNSWORTH. I don't recall it by that name, sir.

Senator MATHIAS. That was a case involving a public golf course, a golf course case.

Judge HAYNSWORTH. Oh, yes, I do.

Senator MATHIAS. You voted to accelerate integration in that case?

Judge HAYNSWORTH. I did.

Senator MATHIAS. In the case of *Wall* v. *Stanley County Board of education*, we can supply the citations for the record, you voted to void the discriminatory discharge of a Negro teacher?

Judge HAYNSWORTH. Yes, sir.

Senator MATHIAS. In the case of *Brown* v. *County Board of Charles City*, you voted to order an integration of the faculty?

Judge HAYNSWORTH. Yes, sir.

Senator MATHIAS. In the case of *Warner* v. *County School Board of Arlington*, you voted to deny a white student's claim of reverse discrimination in the redrawing of boundaries?

Judge HAYNSWORTH. Yes, sir.

Senator MATHIAS. In the case of *Wheeler* v. *Durham Board of Education*, you voted to enjoin the school board from discriminatory application of the North Carolina Pupil Placement Law?

Judge HAYNSWORTH. Yes, I did.

Senator MATHIAS. In *Felder* v. *Hartnett Board of Education*, you voted to order school boards to admit all new students to the schools of their choice, and to advise parents of freedom of choice at the time of the initial assignment?

Judge HAYNSWORTH. Yes, sir, and this was quite an advance beyond what had been done.

Senator MATHIAS. Now, what was the state of the law, as far as the Supreme Court rulings that were in effect at that time? You said it was an advance of what had been done?

Judge HAYNSWORTH. I was referring to the local situation.

Senator MATHIAS. That case was decided in 1965?

Judge HAYNSWORTH. They had a local pupil placement act which was really not fair. Anyone had to run quite a gauntlet to get into the school he wanted, and we held that he could not be required to run such a gauntlet, and that he could go where he pleased, and that his parents must be informed that he had a right to go where he pleased.

Senator MATHIAS. In *Wheeler* v. *Durham Board of Education*, the court voided boundaries drawn with an intent to perpetuate segregation. Did you vote with the majority in that case?

Judge HAYNSWORTH. Yes, sir.

Senator MATHIAS. And in *Chamber* v. *Hendersonville County Board of Education*, the court held that the burden of proof to show lack of discrimination rests upon the school board with a history of discrimination, and not upon the Negro plaintiffs. Do you recall how you voted in that case?

Judge HAYNSWORTH. With the majority. There was a dissent, I believe, but not by me.

Senator MATHIAS. That is all, Mr. Chairman.

The CHAIRMAN. Senator Griffin.

Senator GRIFFIN. Judge Haynsworth, I share the concern that has been expressed by my colleagues, Senator Mathias and Senator Cook, that we want to have high standards for those who go on the Supreme Court. And, I agree with Senator Cook that these standards should not be so high that no mortal could possibly meet them.

However, when it comes to the Canons of Judicial Ethics, I think that the Congress and the people are looking for a strict constructionist. Recognizing how little interest you had in Brunswick, I believe this case has served a purpose in so far as it sheds some light as to the question of whether or not you are a strict constructionist in the interpretation and application of the Canons of Judicial Ethics.

Like you, I wish the Brunswick case had never arisen. I think that the Brunswick case certainly has got to be put in perspective, but if

you did have discretion to provide for a rehearing, if there was an act involving the exercise of judicial discretion in denying the petition to extend the time for appeal, then certainly a strict construction of Canon 26 as it has been interpreted by the American Bar Association would indicate some disregard of that Canon.

Judge HAYNSWORTH. Senator, if there had been any indication by any judge on the panel or any other member of my court, any doubt of this result, it would have been reheard by three other judges, but there was no such indication. Judge Winter's opinion had been approved by every judge of the court, and to schedule it to be reheard before three more would have been a purely futile act, very futile. If it had not been I would have done something else.

Senator GRIFFITH. I appreciate that, and I listened to this explanation before. I yield to my colleague from Maryland.

Senator MATHIAS. On that very point, I think we all agreed Judge Winter has advanced the thought today that where a Canon and the statute might be in conflict, of course, the statute takes precedence, but where the Canon sets a higher standard, and I am looking now to the future, where the Canon sets a higher standard than the statute, what is your view as to how a judge should conduct himself?

Judge HAYNSWORTH. Well, to the extent that the Statute requires the judge to sit, where he does not have a substantial interest in the case, the Statute I would say controls, except I would go on that the Canons, as I read them, apart from this interpretation, which of course is not necessarily the final word on what the Canon means, the Canons can be construed I think with the Statutes and they are not in conflict with them.

The Canons should work for an interpretation of the Statute which favors the removal of a judge, if there is any possible question about whether or not he should sit, and this is the way I think it should operate.

Senator MATHIAS. The doubt should be resolved.

Judge HAYNSWORTH. In favor of the judge's removal of himself.

Senator MATHIAS. Thank you very much.

Senator GRIFFIN. Judge, I am going to focus on another portion of your testimony in connection with the relationship of Mr. McCall and his purchase of securities for you. You indicated that you relied upon him completely, completely depended upon his advice, always followed his advice, et cetera, et cetera.

Now, I don't know whether you really meant that or not, but frankly, this disturbs me a little.

The CHAIRMAN. What was the question?

Senator GRIFFIN. The testimony that Judge Haynsworth completely relied upon the advice of Mr. McCall in the purchase of securities.

Let me develop what I am about to say: Canon 1 says, and I quote:

> The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concerns relations to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, jurors and attendants who aid him in the administration of his function.

Accordingly, you can't delegate to a stockbroker the duty to follow what the Canons of Judicial Ethics require in connection with the acquisition of stock. You would agree with that, wouldn't you, Judge Haynsworth?

Judge HAYNSWORTH. Yes, I would, and I did not mean to suggest that or anything else, but what I do mean, as I attempted to say, a judge in my court has a very full-time job. He does not have time to attempt to be an expert in stock or in securities.

Senator GRIFFIN. I appreciate that.

Judge HAYNSWORTH. And I simply in that field am inexpert, and so when I have funds to invest, I go to him, who is supposed to know something about it.

Senator GRIFFIN. But Mr. McCall testified that he was not aware of or did not take into account your peculiar position and judicial responsibilities when advising you.

Judge HAYNSWORTH. He would not, but I would, and if he advised me to buy something I thought I should not own, I would not buy.

Senator GRIFFIN. That is what I believe is important to get into this record. Blindly following his advice might precipitate an infringement on the canons of ethics.

Judge HAYNSWORTH. Oh, no. His advice would be only in terms of "I recommend this as a good investment," and he would tell me something about it. If there was reason for me not to buy it, why then, that is for me to say, and I would say no.

Senator GRIFFIN. What if he recommended Brunswick and there was a case pending in your court?

Judge HAYNSWORTH. And I knew it was, I would not have bought it.

Senator GRIFFIN. I wish you hadn't.

Judge HAYNSWORTH. I wish I hadn't, too.

Senator GRIFFIN. That is all, Mr. Chairman.

Senator ERVIN. One thing I would like to clear up. Senator Bayh said something about a complaint that the Department of Labor had made about ARA. I ask you if when you received the ARA stock in exchange for the stock for Carolina Vend-A-Matic, if you did not simultaneously make an agreement about disposing of the ARA stock?

Judge HAYNSWORTH. I sold it immediately.

Senator ERVIN. So if there is any complaint against ARA by the Department of Labor, that complaint arose either before you acquired any ARA stock, or after you had disposed of your ARA stock?

Judge HAYNSWORTH. Yes, sir.

Senator ERVIN. Thank you.

The CHAIRMAN. Thank you, Judge Haynsworth.

Senator BAYH. Will the Senator yield? I want to make absolutely certain to put this in proper perspective, that I was not accusing the Judge of any impropriety in relationship to his ARA stock, but suggesting that this is the type of procedure you have to make when you are an officer of a corporation about to merge with another corporation, you find yourself merging with that corporation, and that corporation has a cease and desist order placed against it by the FTC, this is the kind of thing.

I want to say one other word. We have been talking back and forth here about cases, canons and rules and this type of thing. I would think most of us would have to suggest that what is finally determining is what that body on which you may sit says about the canons and the rules and the statutes.

At the risk of being repetitive, what that court has said in a most recent case about ethics, one "must not only be unbiased but avoid even the appearance of bias," after he takes into consideration all of these things, and that is why I must say I take some issue with my friend from Kentucky and his learned constituent, Mr. Torrent, that anyone with any intellectual integrity could not possibly raise the Brunswick or perhaps even the Carolina vending machine matter.

Senator COOK. Will the Senator yield? I think you will find that that letter deals specifically with *Brunswick* v. *Long*. I don't think it has anything to do——

Senator BAYH. Specifically I don't think anybody who has the reputation of Mr. Torrent at the time that point was raised could have had any question about the propriety of it being raised, and even Judge Winter himself suggested that if he had been in the same situation, he would not have acted accordingly.

Senator COOK. I can assure that probably Mr. Torrent would not have acted in that way, either, but you brought up another question, Senator, that I would like to pursue just a little bit.

Are you saying that if you and I hold stock in the XYZ Corporation, as stockholders, and that arrangements are made by the corporate structure to sell to another corporation, that it is our duty as sellers of that stock for which we are to be paid to find out whether the corporation that is buying us, and we are liquidating out, whether that corporation has any pending lawsuits or whether that corporation has any situation involved in any agency of the Federal Government?

Senator BAYH. If the Senator would like to read the letter that was sent to the Senator from Indiana from the FTC, you are welcome to, or I will put it in the record, but the suggestion——

Senator COOK. I am merely asking you the question.

Senator BAYH. It is general knowledge in the vending machine business that this type of concern was being expressed by FTC at ARA.

Senator COOK. That has nothing to do with the question I am asking you, Senator.

Senator BAYH. It surely does. If I am a member of a small corporation like Carolina Vend-A-Matic, and I know that FTC says to ARA, "You are not supposed to assume any more companies," and I go ahead, do I end up with clean hands? I don't think I do.

Judge HAYNSWORTH. Of course, I did not know any such thing.

Senator BAYH. I am sure you didn't. I am sure you didn't, but you are in that rather nebulous gray area again where you are an officer of the corporation.

Judge HAYNSWORTH. No, sir, I was not a director. I was not an officer. I offered to sell my stock—when was this investigation, in 1962 or 1964? I was not a director. I was not an officer. I was nothing. I was not a director, not an officer. I was a stockholder, that is all.

Senator BAYH. At what time?

Judge HAYNSWORTH. I first offered my stock to be sold, and when the arrangement with ARA was under way, I was not an official.

Senator COOK. As I understand the Senator, he is saying that if I own 100 shares of stock in Gulf Oil Co., and as a stockholder a proxy is sent around to me and it says, "Do you want to sell your stock or do you wish to merge and take so many shares of stock in Sinclair,

or do you wish to sell your stock," then it is my duty at that time, before I agree as a shareholder of Gulf to become part of Sinclair, that it is my responsibility to find out whether Sinclair has been estopped from buying any other corporations, or whether they have been put in a position where they may have any claims by the Federal Government against them? Otherwise that it in some manner makes me responsible as a stockholder who is selling out?

Senator BAYH. I don't know what that has to do with the current situation, about a one-seventh owner of a corporation. The vice president is the director and his wife is secretary.

Senator COOK. Senator, you are not paying attention to the record. Senator, the record shows that at the time that the sale was made to ARA, he was not these things, and that at that time he made an arrangement immediately to sell his stock, that he was not going to hold any stock in ARA, and did not intend to hold any stock in ARA, and yet somehow or other you are making him responsible for the actions of ARA, and its past actions.

I think we ought to be fair about this thing, and in this regard I think we ought to get our chronology in order.

The CHAIRMAN. We will recess until 10:30 in the morning. Thank you.

(Thereupon, at 6:05 p.m. the hearing was recessed, to reconvene tomorrow, Wednesday, September 24, 1969, at 10:30 a.m.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

WEDNESDAY, SEPTEMBER 24, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:45 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin (presiding).

Present: Senators Eastland (chairman), Ervin, McClellan, Hart, Kennedy, Bayh, Burdick, Tydings, Hruska, and Thurmond.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

Senator ERVIN. The committee will come to order.

At the request of the chairman I will open the meeting and proceed to take testimony. Before I do, however, I would like to read into the record a letter I have just received from James P. McMillan, Judge of the U.S. District Court for the Western District of North Carolina:

Re Judge Clement F. Haynsworth, Jr.

Hon. SAM J. ERVIN, Jr.,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR SENATOR ERVIN: For twelve years I have known Judge Clement F. Haynsworth, Jr., and for something over a year I have served as a United States District Judge in the Fourth Circuit. He was an excellent lawyer and is, in my opinion, an excellent judge. I have never seen any indication in him of a desire to bend or ignore the law or to steer toward a particular result based on any personal considerations. He is a first-class administrator, a first-class student and one with a determined respect for the order and stability which consistency of decision lends to the judicial process.

I am a lifelong voting and professing Democrat appointed by a Democratic President, and have never before gone out of my way to support any Republican for office. Furthermore (largely because in some local school matters I have attempted to follow what I believe the Supreme Court has been saying in cases like Laney and New Kent County), I find myself currently endowed with the label of being a "liberal" judge. From where I sit, however, I think it is more important to have good men on the Supreme Court than men whose appraisal of fact and law I vainly think I can predict. Judge Haynsworth is such a good man and a good judge, and I would respectfully urge his confirmation upon your committee and the Senate.

Sincerely yours,

JAMES B. MCMILLAN.

Senator ERVIN. Mr. Ryan, you have a statement?

STATEMENT OF HON. WILLIAM F. RYAN, A REPRESENTATIVE IN CONGRESS FROM THE 20TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

Representative RYAN. I have, Mr. Chairman, if I may proceed.

Senator ERVIN. Yes.

Representative RYAN. I would like to thank you, Mr. Chairman, and the members of the committee for this opportunity to testify concerning the nomination of Judge Clement F. Haynsworth, Jr., to the Supreme Court of the United States. In a period of deep controversy and division in our Nation about the direction and speed with which the fundamental American promise of equality and equal rights for all of our citizens is being fulfilled, this nomination is a litmus test of our resolve.

For over 15 years our Nation has been committed to move toward the full desegregation of our public schools. The pace of desegregation during that period has been agonizingly slow. Now, 15 years later, the glacial pace has quickened to the point where something over 20 percent of the black children in the South are attending public school with white children.

That is at best an unsatisfactory achievement. Nevertheless, it is quite clear that the present administration has slowed the already painfully slow process of desegregation.

Whatever tortuous arguments are made to twist the substance of recent administration pronouncements, the plain fact is that a policy congenial to those who would preserve the old order has emerged. Southern school districts have suddenly found that it is inconvenient or impossible to do what they promised to do only a few months ago. Federal judges have taken the cue as well, allowing previous desegregation orders to be delayed.

Mr. Chairman, in this atmosphere, Judge Haynsworth is appointed. I am sad to say that a study of his record reveals that his votes on the Bench may be the pivotal steps toward further retrenchment on the fundamental law of our land. That is a chance which I think we cannot afford to take.

Judge Haynsworth's record tells us that he is what Southerners call a "moderate." What that means I suppose is that he has never espoused doctrines like interposition or massive resistance, but has only cast crucial votes at crucial times against speeding the pace of desegregation and for slowing it down.

I am sure that other witnesses will lay out his record for the committee in detail, but the major points of the record or worth mentioning:

His vote against requiring the schools of Prince Edward County to be reopened and his later vote against citing the county supervisors for contempt.

His vote in favor of the evasion tactics of allowing free transfer for any child in a racial minority in a local school.

His vote against requiring desegregation of public school faculties.

His vote in favor of freedom of choice for school desegregation plans.

His vote against requiring desegregation of hospital facilities financed under the Hill-Burton Act.

I am certainly aware that there can be complicated discussion surrounding the legal technicalities in each of these cases. The basic point is that in all of them Judge Haynsworth was either overruled by a majority of his own colleagues or by the Supreme Court of the United States. The further fact is that these decisions constitute a record encouraging evasion and delay in the implementation of the Supreme Court decision of 1954.

It may be asked, what about those who would want a slower pace, whom Judge Haynsworth would in effect represent on the Supreme Court? I raise this question because I think it dramatizes the risk to the vindication of basic American rights which is involved in this nomination.

There are certain values which are articles of faith in a democracy, certain values which are so fundamental that they cannot be compromised in any way. The principle of equal opportunity for all of our citizens, including equal educational opportunity, is one of those root ideals.

Imagine what would have happened if the Supreme Court in 1954, instead of holding as it did, had said it would open negotiations with southern school districts. I have absolutely nothing personal against Judge Haynsworth, but I say to the committee that confirming his nomination is like saying in 1969 that negotiations with the southern school districts will be opened.

The Supreme Court is a crucial and powerful institution in our society. Its pronouncements affect the lives of millions. It has deep symbolic meaning for millions more. It is perhaps the one reason why many otherwise disillusioned Americans still trust in and respect the American system.

I do not believe that a judicial record which has involved evasion of the mandate of the Supreme Court of the United States should be rewarded by appointment to that very Court.

There are other matters as well—Judge Haynsworth's attitude toward labor and the conflict-of-interest question regarding the Carolina Vend-a-Matic Corp., and his stockholdings in the Brunswick Corp. These matters are being aired in full before you by other witnesses, therefore I will not attempt to go into them or elaborate upon them.

My principal argument is that it would be turning back the clock on civil rights and impair public confidence in the orderly process of justice in equal rights to place Judge Haynsworth on the Supreme Court of the United States.

The action which this committee takes on this nomination may well determine the course of events on one of the most crucial issues affecting the future of our great Nation.

I thank you for the opportunity to appear. I appreciate the time.

Senator ERVIN. What decisions in which Judge Haynsworth participated show he has an antilabor bias?

Representative RYAN. I am principally concerned, Senator, with his decisions affecting civil rights. Of course, as far as the labor cases are concerned, there was the case involving the closing down of the textile company in order to avoid unionization.

Senator ERVIN. That matter was heard by a trial examiner. The trial examiner was the only man connected with the case in an official

capacity who saw the witnesses, observed their demeanor upon the stand, and therefore had any reliable way to tell the value and credibility of the witnesses' testimony. The examiner found that there was no unfair labor practice, but he found that there were economic causes for the company to close down.

Now, that case was involved in litigation three times. The first was in the 1961 decision, and there the union was seeking to have a remand order of the Labor Relations Board to take further evidence on a specific point enforced. The district court had completely enjoined any such hearing, and Judge Haynsworth voted for the decision which modified the injunction of the district court and decided the case in favor of the union.

Now, how does that case show any antiunion bias when it was decided in favor of the union?

Representative RYAN. I am sure that other witnesses representing organized labor will appear and will go into detail with respect to the decisions affecting labor which have been rendered by Judge Haynsworth.

Senator ERVIN. Mr. Ryan, how can you say that a decision which a judge renders in favor of a union and against the employer shows a bias against union labor?

Representative RYAN. I am not contending that a particular decision, if that were the result, would show such bias. What I am really contending before the committee this morning is that a whole series of decisions affecting the implementation of the Supreme Court desegregation decision——

Senator ERVIN. On page 3 you question Judge Haynsworth's attitude toward labor and mention the conflict-of-interest question regarding the Carolina Vend-A-Matic Corp.——

Representative RYAN. I did.

Senator ERVIN. Now as a matter of fact there was a second case involved in the Darlington Mills and that was handed down in 1963 and the only result of that decision was that the circuit court in an opinion written by Judge Haynsworth refused on two grounds to enforce the decree of the National Labor Relations Board. In the first place, Judge Haynsworth said that regardless of whether Darlington had gone out of business completely or partially, it had an absolute right to close down its business either completely or a part of it at any time for any reason.

The Supreme Court sustained this point and said that any private employer has the right to go out of business at any time for any reason whatever, including union bias.

The Supreme Court reversed Judge Haynsworth's second reason, but they said that the results of the decision in refusing to enforce the decision of the National Labor Relations Board was sound because the National Labor Relations Board had not made a determination with respect to certain issues of law and fact which were essential to a decision in the case.

Now, I cannot see where you can say a man shows any union bias by agreeing to a proposition which was sustained by the Supreme Court on appeal. That proposition is that the case was in no position for the enforcement order.

When the case went back the third time before the circuit court, Judge Haynsworth joined the majority of the court in the decision which was in favor of the discharged employees of Darlington and against Darlington and Deering Milliken. For the life of me I cannot understand why anybody would say that a man is antilabor and then demonstrate it by citing these decisions which he rendered in favor of the union.

I looked at the other cases with George Meany, and Mr. Harris said showed an antiunion bias. One cited was the case where Judge Haynsworth reversed an order of the National Labor Relations Board in discharging seven nonunion men, the *NLRB* v. *Washington Aluminum Co.* case.

Now, how in the world a decision involving nonlabor employees can be said to show bias against unions is another thing I am mentally incapable of comprehending. I cited the *Darlington* case where the decisions were in favor of the union. In their statement the AFL–CIO cited seven other cases including the one I mentioned.

Four of them involved the question of the law bearing upon the power of the National Labor Board to compel the employee to negotiate with the union on the basis of cards where there had been no election.

One of those cases, a local case, and that is the only one of these cases written by Judge Haynsworth except the ones he wrote in favor of the union, he reversed the order of the National Labor Relations Board ordering the employer to deal with this union because the evidence did not show that the union represented a majority of the employees.

There was no appeal from that, and so, evidently those who participated in that case did not think it was a wrong decision because they did not appeal it.

The other three cases on the card counting question were cases where the National Labor Relations Board held one way, and the circuit court refused to enforce it. Those cases were tried under the old doctrine holding that the crucial test was whether an employer honestly believed that the union which demanded recognition on the basis of cards really represented a majority of the employees.

The National Labor Relations Board filed a brief based on the old law, but when his counsel got up to argue the case he said that the National Labor Relations Board had adopted new rules. The Supreme Court quite rightly held that the decision would have to be sent down to the National Labor Relations Board because it had not made any findings of fact under the new rules invented in the oral argument of counsel for the National Labor Relations Board.

The only criticism that could be made about Judge Haynsworth in respect to those cases is that he was not a good enough prophet. He was a good enough lawyer to go by the old law but was not good enough prophet to anticipate that the counsel for the National Labor Relations Board was going to change the rules in his oral argument before the Supreme Court and the Supreme Court was going to approve of the new rule.

Another one of the cases cited to show antilabor bias was a case in which the Supreme Court had never passed on the question before Judge Haynsworth. In that decision, the Circuit Court had tried the

case and it went up on appeal to the Supreme Court. Six days before the Fourth Circuit case was considered by the Supreme Court, they passed on the same question, and the Supreme Court reversed that case on the basis of their decision made six days before.

Any insinuation that Judge Haynsworth has shown himself in his decisions to be antilabor is just absurd. I do not care who makes them.

Now I will go to another thing.

Representative RYAN. Let me say on this point I am sure that there will be witnesses thoroughly conversant with his decisions in labor matters who will present arguments and will be able to discuss the details of those decisions.

Senator ERVIN. We have discussed them here. Those witnesses have been here, and it has been clearly demonstrated that the cases do not prove any antiunion bias. Those 10 cases cited by the AFL–CIO out of the 47 Judge Haynsworth participated in just prove that Judge Haynsworth is a judge who recognizes that there are 3 groups of people who have rights under the National Labor Relations Act. One is management, the other is unions, and the others are the individual employees.

You state here there are somewhere in the neighborhood of 20 percent of the black children in the South attending school with white children. What proportion of the black children in the North are attending school with white children?

Representative RYAN. I do not have the statistics. However, we all recognize that there is de facto segregation in the North, and we all recognize that there has been a policy of enforced segregation in the South which the Supreme Court decision was intended to overcome. To implement that decision efforts have been made through 15 years, and still after 15 years the level is only 20 percent.

Senator ERVIN. Don't you know that every statement on the subject states that there is a smaller percentage of black children attending schools with white children in the North than there are in the South?

Representative RYAN. I simply do not accept that. In New York City in our schools the percentage runs as high as 50 or 60 percent.

Senator ERVIN. Well, that is just a few borderline schools and not those in Harlem or other ghetto areas.

Senator BAYH. Will the gentleman yield at this point?

Senator ERVIN. Yes.

Senator BAYH. You have been very accurate in documentation of cases. I think you submitted 37 cases in this whole area, and I want to have a chance to study those fully. I would like for the sake of consistency to have these statements that you just alluded to verifying the opinion of my distinguished colleague from North Carolina, we could also have those so we could peruse those.

I do not know of such statements, and I am sure that the Senator would not make such an allegation if he had not read them, and I would like to see them.

Senator ERVIN. All the Senator from Indiana has got to do to corrobrate my statement is to go out and read the cases. I have done that.

Senator BAYH. The gentleman from New York has mentioned that he is not aware of this with his constituency. I am not aware of the allegation of the small percentage of black students attending schools with white students in Indiana. In fact, we dealt with this a long time

ago, so if we are going to be accurate here, I think we had better confine our allegation to what really has been said and written.

Senator ERVIN. I will say to the Senator from Indiana and also to the gentleman from New York that every statement I have ever seen on the subject has stated that there is a smaller percent of black children attending schools in the North with white children than there are in the South.

I have not counted them myself.

Senator BAYH. I have not read these statements, but it is very easy to read an article which says there is a smaller number of black students attending schools with white students in the North, and confuse that with a smaller percentage, and I wonder if my friend from North Carolina might have made that——

Senator ERVIN. If it is a smaller number attending, it must be a lower percent, because as I understand it the black population in the North and in the South for the first time in history are approximately equal.

Senator BAYH. If you take a look at any one given State, that would not be true.

Senator ERVIN. Mr. Ryan, do you contend that in New York they do not have a situation in which white people usually live in one community and black people in another?

Representative RYAN. I certainly do not contend that the residential housing pattern is not reflected in the school population, and this is called de facto segregation. Efforts are made in our city to overcome this through various plans—pairing schools, transporting students from one area to another, open enrollment, educational parks. The point is that in New York and in the North there has never been a law which required the separation of the races in school, and this is the issue.

Senator ERVIN. There is not any law in the South that requires the separation of children by races in the schools.

Representative RYAN. That was outlawed in 1954 by the Supreme Court. But the policy and pattern of segregation have continued as the mandate of the Supreme Court has been circumvented.

Senator ERVIN. It is a peculiar thing that you advocate doing something about the South to overcome racial imbalance, but you do not do anything in the North to advocate overcoming racial imbalance.

Representative RYAN. On that I respectfully disagree. I think great efforts are being made in the North to overcome racial imbalance.

Senator ERVIN. The Federal Government is not making them.

Representative RYAN. The Federal Government is providing financial aid to assist cities and States in carrying out programs which will do exactly that.

Senator ERVIN. What about the schools in Harlem?

Representative RYAN. What about the schools in Harlem?

Senator ERVIN. What has the Federal Government done to desegregate schools in Harlem: either through the agency of courts or through the agency of HEW?

Representative RYAN. The Federal Government has provided financial assistance to the board of education of the city of New York to carry out programs in order to achieve greater racial balance.

Senator ERVIN. Don't you know you have many schools in New York that are totally segregated in fact?

Representative RYAN. Of course there are some schools——

Senator ERVIN. Yes?

Representative RYAN (continuing). In the North and the West which are predominantly black or white. That does not result from enforced segregation.

Senator ERVIN. Frankly I have been interested in this subject and I have tried to keep abreast of it. I do not know of a single effort that the Federal Government has ever made to desegregate schools in the North except one little case out somewhere in the Middle West, and then the threat that they breathe down the backs of the city of Chicago some time ago in desegregating classes.

Representative RYAN. If I recall correctly the commissioner of education issued a directive to the city of Chicago not long ago.

Senator ERVIN. They talked but they have not done anything yet. They talked once before, and Mayor Daly called up President Johnson and he called off the dogs. You do not call off the dogs down South. You are opposed to freedom-of-choice plans in school desegregation?

Representative RYAN. I am opposed to the amendments which were offered in the House; the Whitten amendment, the Fountain amendment.

Senator ERVIN. You also stated in your statement that you are opposed to any negotiations of the courts with southern schools?

Representative RYAN. What I said was that confirming this nomination would be tantamount to negotiating over the issue of desegregation of the southern schools.

Senator ERVIN. Your opinion is that the courts should take away the entire control of the subject from the school districts in the South and do it themselves?

Representative RYAN. Not necessarily. I believe there are times when the courts sanction strategies to evade the Supreme Court decision, and therefore I believe that the Federal Government should take action, directly, administratively, without going to the courts.

Senator ERVIN. You say confirming Judge Haynsworth's nomination "is like saying in 1969 that negotiations with the southern school districts will be opened." Do you oppose open negotiations with the local people who are in charge of operating the schools?

Representative RYAN. I am opposed to negotiating over the enforcement of the law of the land that has been the law of the land since 1954. I think it should be enforced, and there is no room for further negotiations or delay.

Senator ERVIN. In other words, your opinion is that as far as the South is concerned, that the Federal courts and HEW should take over the control of the southern schools on this question?

Representative RYAN. My opinion is that, as far as any part of the country is concerned, the Supreme Court decisions should be enforced and should have been enforced promptly; that 15 years is a long time, and that a number of strategies for evasion have evolved over that period of time, some sanctioned by the courts, and that the decisions of Judge Haynsworth indicate that he has sanctioned those strategies of evasion and delay.

Senator ERVIN. A freedom of choice system is the freedom of choice in which the school board opens the schools under its jurisdiction to all children of all races, and allows the children or their parents to select the schools which their children attend. Now, what is wrong with that?

Representative RYAN. The practical effect of that is that it perpetuates segregation, and that the white chlidren end up in one school and the black children in another.

Senator ERVIN. Well, if the whites and blacks want it that way why shouldn't they have the freedom to say so?

Representative RYAN. Because the historic pattern of intimidation and coercion still exists, and because of the fear which parents have toward——

Senator ERVIN. Down in North Carolina in Hyde County the black parents have been demonstrating for a year because they closed down two schools that had been attended by their children and compelled them to go to a white school. That has been repeated time and time again all over this country. Speaking of intimidation, if the Department of Justice does its duty, it can send to prison under the law we passed last year every person who uses force or threat of force to interfere or intimidate any person enrolling or attending any school. So the Department of Justice could do away with that kind of intimidation. Do you think it is better for the Government to intimidate people than for rednecks to intimidate people?

Representative RYAN. I do not see the analogy.

Senator ERVIN. The analogy is you are in favor of compulsory integration of schools regardless of the wishes of the parents and the schoolchildren. You say the Government should compel them to go to school together whether they want to go together or not. Now, that is intimidation by the Government.

Your testimony would indicate to me that you might be opposed to economic intimidation by individuals, but you are in favor of the program of the HEW which is based solely upon economic intimidation of all the people in the South by threatening to withhold Federal funds.

Representative RYAN. I was one of the authors in the House of title 6 of the Civil Rights Act of 1964, and it is my view unfortunately that HEW has not vigorously enough enforced title 6.

Senator ERVIN. In other words, you want to practice more economic intimidation than they are doing?

Representative RYAN. I would not call it economic intimidation.

Senator ERVIN. That is exactly what it is, when you say "I will give you some money if you desegregate the way I want you to desegregate and if you do not do it I will not give you any money."

If that is not economic intimidation by the Federal Government I do not know what it is.

Representative RYAN. I think that the Federal Government should use whatever means it can to compel compliance with the decision of 1954.

Senator ERVIN. The decision of 1954 was simply this. It said that it was a violation of the equal protection clause of the 14th amendment for a State to deny any child the right to attend any school solely upon the basis of that child's race. That is what it said, and not anything

else, and when the school district opens the schools to all children of all races, and lets them select their own schools, it is not denying them admission to any school.

But when the Government resorts to transportation of a child from his neighborhood to some school over in another area, either because the races are not mixed sufficiently in the school, in the opinion of some bureaucrat, or to desegregate another school, it is denying that child the right to go to his neighborhood school on account of his race, and is a flagrant violation of the *Brown* decision and the 14th amendment.

Representative RYAN. For years children, black children, were transported, bused for miles out of their neighborhoods right past brand-new schools which were for whites only, in order to attend segregated schools. That was a pattern that existed year in and——

Senator ERVIN. That is no longer the pattern.

Representative RYAN (continuing). Year in and year out.

Senator ERVIN. That is no longer the pattern. Now the pattern is reversed. If you can mix children, black and white children in a school by compelling them to go to the neighborhood school they make them go to it. But if you cannot do that, they make them run a gerrymandered line to bring them over there, and if you cannot do it then you put them on buses and haul them off, not to educate them but to integrate them.

Representative RYAN. Perhaps integration is part of education.

Senator ERVIN. Oh, well, if that is so how are the people of Africa where they are all black ever going to get educated? Will you explain that to me? And how are the people in Germany where they are all white ever going to get educated?

Representative RYAN. It seems to me in our country, a country of diverse peoples, races and colors, that it is important for the cultural development and educational development of every child to have the opportunity to attend school, and to learn in the process, with children of other colors and races.

Senator ERVIN. Evidently the Germany people and the black people in Africa cannot hope to get educated on that theory, because they are not mixed with other races. Now in my capital city of Raleigh the school board laid out new school districts, and I got a letter from a father. He said that he had two boys of high school age and there was a high school four blocks from their home, but they compelled his sons to go 4½ miles away to another high school, giving the same reasons you did then. When he applied for a transfer to let them go to the high school four blocks away instead of the 4½ miles away, they said, "No, if you go to the one four blocks away you will not become acquainted with as many people of another race as if you go 4½ miles."

So these boys had to walk 4½ miles one way to school, 4½ miles back, and the father wrote me a letter and he asked me this question, and I would like for you to answer it.

Why do children have to be herded around like cattle and shifted about like pawns in a chess game just to get them integrated?

Representative RYAN. It seems to me that integration is a valid social objective, and that the movement of schoolchildren in order to achieve it should be encouraged.

Senator ERVIN. So you approve denying boys an opportunity to attend a high school unless they walk past a high school four blocks away and then walk 4½ miles from their home in order to get to high school just to mix them up?

Representative RYAN. I approve of efforts being made by schools to achieve a pattern of integrated education.

Senator ERVIN. In other words, segregation in schools has been outlawed, and you favor substituting for outlawing schools segregation federally coerced school integration. That is what you favor essentially?

Representative RYAN. No, I favor school integration, and I would hope that it would not be necessary for there to be any coercion, but if schools do not comply, then I believe that the Federal Government should use its power in order to bring about compliance.

Senator ERVIN. Well, now, what do you mean by compliance? Do you mean that schools must go out and grab children and drag them into the schools because of their color, instead of operating primarily as education institutions?

Representative RYAN. The effort here is to overcome years of so-called separate but equal schooling.

Senator ERVIN. The *Brown* case simply held that you could not bar children from school on account of their race. Now do you say that children should be forced into schools just to mix them up?

Representative RYAN. I think the *Brown* case held more than that.

Senator ERVIN. No, no.

Representative RYAN. I think the *Brown* case held that separate but equal was inherently unequal.

Senator ERVIN. The reason was because they ought not to exclude children from schools on account of their race. Now I have read Judge Haynsworth's opinions on school desegregation cases, and I think there are two observations to be made on this point.

The first is that the Federal judiciary is a hierarchy in which judges at the lower echelons are obligated to follow the decisions of judges in the higher echelons, irrespective of whether they agree or disagree with those decisions.

Secondly, after reading Judge Haynsworth's opinions, I would have to say that they show beyond a shadow of a doubt that every decision he ever participated in was in line with the Supreme Court decisions in existence at the time he rendered the decision.

Representative RYAN. Let me simply say in response that I have before me at least four cases on this subject in which the decision in which Judge Haynsworth participated was reversed by the U.S. Supreme Court.

Senator ERVIN. That does not make any difference because the Supreme Court of the United States on this question has been changing the law, expanding the law far beyond the limits of the previous decisions and beyond the "Equal Protection" clause which merely says that a State shall not treat people differently if they are similarly situated, and when they open schools to children of all races and let them pick the schools they are treating them all exactly alike, and there cannot possibly be a violation of the equal protection clause of the 14th amendment.

Representative RYAN. Let me pose a question.

Senator ERVIN. Yes.

Representative RYAN. Would you, sir; condone the action of a local county in completely closing down the public schools as happened in Prince Edward County, in order to avoid compliance with the mandate of the Supreme Court?

Senator ERVIN. I think the schools ought to be run by the local people, yes; I believe in local self-government.

Representative RYAN. Even if it leaves all of the children without any public education?

That is where we disagree, and this is the basis for my opposition to this nomination.

Senator ERVIN. Yes. Well, that has only happened in one county.

Representative RYAN. But this is the judge who upheld that.

Senator ERVIN. I do not approve of that as a matter of practice, but I think the school boards of the counties should have the right to say whether it is going to run schools at all or not. I do not quarrel too much with the basis of the Supreme Court decision in the *Prince Edward County* case because the basis of that decision was that Virginia was operating schools in other counties in the State and would have to operate it in this county.

I agree with the decision in the *Prince Edward County* case.

Representative RYAN. The Supreme Court decision?

Senator ERVIN. Yes, but I respect what a county does but I think the people ought to run the schools with reference to them, rather than by nine men sitting up here on the bench on the Potomac River, because I believe in local self-government, but I do not quarrel with the basis of that decision.

What is your other case?

Representative RYAN. In *Bradley* v. *School Board* of the city of Richmond——

Senator ERVIN. I would say this. At the time that case was handed down, that it was in accordance with all the law on that point up to that time, because there was not a single decision in this country that the Constitution of the United States required the operation of any schools at all.

Representative RYAN. I do not see how anyone could interpret it as anything other than a strategy to evade the Supreme Court decision.

Senator ERVIN. If you run a school you have got to make it open to all children who want to come to it, but they just closed down all the public schools.

Representative RYAN. And that was condoned and upheld by Judge Haynsworth in that decision.

Senator ERVIN. Well, there was not a decision up to that time that held that the Supreme Court of the United States had jurisdiction to compel the opening of the schools or the operation of the schools. I can see why people would make that decision, although I do not quarrel with what the Supreme Court did in it. The Supreme Court said that since Virginia was operating schools in other counties it would have to operate schools in Prince Edward County, and I think that is logical, but I maintain the circuit court's opinion in that case was in accordance with the law up to that time as it had been interpreted.

What is your other case?

Representative RYAN. There was the case of *Bradley* v. *The County School Board of New Kent County*, in which the court, with Judge Haynsworth participating, held it was not necessary to desegregate the faculty. That was reversed by the Supreme Court of the United States, 382 U.S. 103.

Senator ERVIN. You are talking about the *Kent County* case?

Representative RYAN. That is the *New Kent County* case.

Senator ERVIN. That is *Green* v. *New Kent County*?

Representative RYAN. No, sir; this is *Bradley*.

Green was a freedom-of-choice case.

Senator ERVIN. Yes, *Green* was a case I have read about twenty-five times.

Senator BAYH. Excuse me, Mr. Chairman, is this the *Green* case we are discussing or is this the *Bradley* case?

Senator ERVIN. He is discussing *Bradley* but I am talking about a subsequent one.

Representative RYAN. Both in New Kent County.

Senator ERVIN. The only thing you can say about the *Green* case is this: The facts are clear, the language of the opinion is ambiguous and murky, and the case lays down no understandable law or workable rule.

As near as I can figure it out, Justice Brennan said in that case that New Kent County had absolutely abolished every trapping of State-imposed segregation three years before the opinion was written by the Supreme Court. The Court said that they had two schools in the county, the New Kent school and the Watkins school. In the days of segregation the Watkins school had been a school for colored children and the New Kent School had been a school for white children.

The county not only abolished every vestige of State-imposed segregation, but they said that the black and the white children of New Kent County can go to whichever one of these schools they wanted to go to.

When they had freedom to make a choice, none of the white children elected to go to the Watkins school, and only 15 percent of the colored children elected to go to the New Kent school.

Mr. Justice Brennan said that that was not an adequate freedom-of-choice system allowed there, even though everyone chose the school they were to attend. Brennan said further that it was not an adequate compliance with the decision in the second *Brown* case and that the school board should adopt a system for admission to the schools on a nonracial basis. The only reason he gave for it was that the children did not choose to go where the Supreme Court justices thought they ought to go.

So Justice Brennan did not even pass on the constitutionality of freedom of choice, but he said the Court would only accept those plans which "worked". The only inference you can draw from that case is that freedom-of-choice systems are perfectly valid as long as the schoolchildren choose in the way in which the Supreme Court Justices think they ought to choose, but they are invalid when the schoolchildren do not choose the way the Supreme Court Justices would like them to choose. I say it has come to a pretty pass when the liberties of the American people are going to hang by such a tenuous and arbitrary judicial thread.

Well, you and I sort of disagree, I think.

Representative RYAN. I am inclined to believe that is the case.

Senator ERVIN. Now, I would say you had a great lawyer and a great judge in New York, one of the most eloquent of men, named Benjamin A. Cardozo. Benjamin A. Cardozo said this in his little book on Growth in the Law at page 10: "In breaking one set of shackles we are not to substitute another."

To my mind that is precisely what people that have your philosophy about this are trying to do. They have broken the shackles of segregation and they are going to substitute another set of shackles—the shackles of compulsory integration done by judicial and economic coercion of the Federal Government, which denies the parents of this country, to whom the schoolchildren belong, the right to pick out the schools that their children will attend. I think it is about time to get some sanity in this thing, and realize that if segregation be bad, then compulsory integration against the will of the people is also bad, and that the parents of children ought to be allowed to select schools their children attend as long as those schools are open to children of all races.

In other words, I think they ought to take the little schoolchildren of America away from the judicial activists and the HEW bureaucrats and give them back to the parents to whom the Lord has given them.

Representative RYAN. My fear is that Judge Haynsworth would agree with you.

Senator ERVIN. I think any man agrees that the fundamental principle of our Constitution is to procure liberties of the people. I do not know why any man would not think that the parents, who have a greater interest in the education of their children than anyone else on earth, should not have the right to say where they should go to school. That is all.

Senator KENNEDY. Mr. Ryan, I just want to extend a word of welcome to you to these hearings, and to thank you for taking the time to testify and express yourself on the question of the qualifications of the nominee. I just want to thank you for your appearance.

Representative RYAN. Thank you very much, Senator. It is a pleasure to appear before all of the members of the Judiciary Committee.

Senator ERVIN. And I would like to say that my pleasure is not lessened by the fact that I disagree with you, because controversy sometimes strikes some sparks of illumination. It seems to me that if it does strike a spark of illumination we will be able to see that the children belong to the parents and we should give the children back to them and let the children go to the schools their parents want them to go to instead of having them pushed around and herded about like cattle and shifted about like pawns in a chess game. Thank you.

Senator BAYH. I share the hope of my distinguished colleague from North Carolina that we may strike some sparks of illumination—and may that light shine on both sides of the witness table.

Congressman Ryan, you are kind to be with us. Is it fair to assume from the penetrating statement that you have made that you believe that the philosophical bent or the direction in which the judge's decisions may lead this country on issues, labor relations, equal opportunity for all citizens, is a matter of fair consideration by this committee?

Representative RYAN. Yes, sir, I do. I think it is a matter which should be of very deep concern to every member of the committee.

Senator BAYH. We appreciate you taking the time to share your concern.

Representative RYAN. Thank you.

Senator ERVIN. Do you think equal opportunity requires us to deny some children the right to attend neighborhood schools while allowing other children in the same area to attend the neighborhood schools? Is that equality?

Representative RYAN. Unfortunately neighborhood schools have become sort of a euphemism for the preservation and perpetuation of segregation. If the pattern is going to be broken down, it will require efforts on the part of local school districts, which involve taking steps, such as transportation of children, the pairing of local schools, zoning changes and so on, in order to achieve integrated and quality education.

Senator ERVIN. I would certainly say that if the local school boards want to do that that is their business, but I do not think it is the business of the Federal Government to do it.

Representative RYAN. I think where the Federal Government is financially underwriting education it certainly has a very direct interest.

Senator ERVIN. Just one more obervation about Judge Haynsworth. Instead of championing any of the causes I am championing Judge Haynsworth has diligently followed every decision of the Supreme Court that had been handed down up to the time he rendered any opinions in this area. If I were to say I had any criticism of it it would be he has been too faithful to his job to evade the dictates of the higher authority.

Representative RYAN. My point was he was overruled by the Supreme Court or the majority of his own colleagues in these decisions.

Senator ERVIN. I disagree with you. That is not correct.

Senator KENNEDY. Let me ask one question. One of the things that I think many of us have been trying to wrestle with is the question of the test and standard which ought to be used by the members of the committee. I think all of us would pretty much agree that we certainly do not want just to subscribe to a political test or a simplistic philosophical test in trying to reach a decision about the approval or the disapproval of a candidate.

Certainly the history of action taken both by this committee and in the Senate is replete with examples of instances where the exercise of an opinion based solely on a philosophical outlook has later been proven mistaken, and I think you are aware of these examples as well as we are.

There has been the suggestion that the only criteria which should be used are the criteria of basic and fundamental integrity, judicial competency and judicial temperament. These are, as I understand from the testimony of the American Bar Association, really the only criteria which they use, and there are members of this committee who subscribe to that standard as well.

During the course of these hearings there has been suggested in the questioning of Judge Haynsworth, the question whether he really is a contemporary man or a man of the times who shows an appreciation for the movements which exist within our society and the dynamic

forces which I think today are perhaps the most significant and important influences within our own system: the problems of the youth, the poor, the disadvantaged groups, the forgotten Americans, the various other people whom I think we have read about and heard about, and whom you as a public representative I am sure are very much aware of.

I would just be interested, Congressman, if you, as a thoughtful person, would be able to add any other criteria to these rather limited three, which I believe are perfectly reasonable but perhaps somewhat stark tests. I wonder whether you think we on this committee ought to be trying to look beyond basic flaws, and beyond philosophical differences to something more meaningful in terms of the perspective and sensitivity of the candidates we approve, and whose nominations, under our system, we are asked for our advice and consent on.

Representative RYAN. It seems to me, Senator, that the nomination is before the U.S. Senate, and that criteria should be applied which not only consider a judge's integrity and his temperament, but that it is perfectly valid to review his record as a judge, his attitude on important public questions, and determine whether or not his attitude as expressed in his decisions and his philosophy is consistent with the forward thrust of American society at this point in the development of our Nation.

I am sure that others will weigh whether he is a strict constructionist or a judicial activist. I think it is valid to consider what the effect of this nomination may have upon future decisions of the United States Supreme Court which affect broad questions of public policy. The Supreme Court is called on to deal with matters which are far more comprehensive in nature than simple legal controversies which come up from the lower courts.

The Supreme Court does help to set public policy in this country. It does mould future events, and it has, through the decision of 1954 and through other decisions helped our Nation to embark on a course which should resolve many of the very severe problems which confront us today, and will confront us during the rest of this century.

It seems to me that it is fair to ask whether or not this appointment on the basis of a past judicial record is one which will contribute to this forward thrust or will in effect set it back. I have suggested that it would be like turning back the clock in many ways, and that pivotal decisions will be before this Court in many areas of race and human relations during the coming years, and it is important in my opinion to weigh just what the effect of this nomination will be on those matters.

Senator KENNEDY. I suppose what you as well as, I think, all the members of this committee and Members of the Senate recognize is that certainly we could not expect the candidate to respond to particular fact situations which may very well appear in the form of possible cases that may come before him on applications for writs of certiorari or for actual consideration by the Court some time in the future, but I suppose, I gather from your response that you believe that we do certainly have the right, and we should attempt to inquire into at least his understanding and appreciation for some of the events that are taking place within the framework of our system, in terms of anxieties, frustrations, hopes—obviously just in broad strokes.

Representative RYAN. I think that is a very fair statement.

Senator KENNEDY. These, then, are legitimate areas of inquiry, and I gather from your testimony that this type of inquiry is perhaps of great importance and relevancy, in view of the fact that the Supreme Court has been a key institution, and perhaps the most effective institution, for social justice and necessary social change, certainly within the last 15 years, and that there are elements of our society who, if they lost confidence in that particular branch of the Government, would certainly find it a good deal easier to consider moving into more violent and more discredited means of change.

Representative RYAN. Yes, I think it is important to weigh whether or not the appointment of a given individual may impair confidence in the system. I think that is a fair question to ask.

Senator KENNEDY. You think that is a legitimate area of our inquiry?

Representative RYAN. Absolutely.

Senator KENNEDY. In terms of qualification and ability to serve effectively, in meeting our responsibilities under the Constitution, you think it is necessary to cover those areas?

Representative RYAN. I believe it is.

Senator KENNEDY. Thank you very much.

Senator ERVIN. The only test laid down by the Constitution on this one, however, is that judges shall accept as their guide for their official action the Constitution of the United States which they are sworn to obey.

Representative RYAN. And who was it who said the Constitution is what the Supreme Court says it is?

Senator ERVIN. You believe that the Constitution has no meaning?

Representative RYAN. Of course I do not believe it has no meaning, but I also believe that the Supreme Court interprets the Constitution, and how it is interpreted very well affects the direction of our country.

Senator ERVIN. They are supposed to interpret according to the decisions in harmony with the words of the Constitution, if they are plain, and if they are ambiguous then they are supposed to put themselves in the position of the men who wrote and ratified those words, and determine by so doing what those words were intended to mean.

Representative RYAN. In the light of contemporary circumstances——

Senator ERVIN. Oh, no.

Representative RYAN (continuing). And events.

Senator ERVIN. The Constitution says if they are not satisfied with the provisions of the Constitution as interpreted that Congress and the States can amend it.

Senator Burdick?

Senator BURDICK. Mr. Chairman, I am sorry that I missed your direct statement. You referred to four cases in which Judge Haynsworth participated. I presume the names of the cases are in the record and the citations?

Representative RYAN. I will supply them for the record. They are not in my statement. I will supply them.

Senator BURDICK. Will you name them now then?

Representative RYAN. Yes. In my statement I referred to his vote on the *Prince Edward County* case. That was *Griffin* v. *Board of Supervisors of Prince Edward County*, (322 Fed. sec. 332). The next was the question of using transfers out of schools, neighborhood schools, as a device to retain segregation. That was *Dillard* v. *School Board of Charlottesville, Virginia* (308 Fed. sec. 902). The next one was *Bradley* v. *County School Board of New Kent County, Virginia* (345 Fed. sec. 312). There he voted against requiring desegregation of public school facilities. The next one was a Freedom-of-Choice case, *Green* v. *County School Board of New Kent County* (382 Fed. sec. 338). The next one was his vote against requiring desegregation of hospital facilities under the Hill-Burton Act. That was *Simpkins* v. *Moses H. Cone Memorial Hospital* (323 Fed. sec. 959).

Senator BURDICK. Just to same time, were any of those split decisions or were they unanimous?

Representative RYAN. In the Griffin case, which was reversed by the Supreme Court, Judge Haynsworth wrote the majority opinion, and Judge Bell dissented. In the Dillard case Judge Haynsworth was in the minority of his own court. That was a 3 to 2 decision, and Judge Haynsworth was in the minority of his own court, voting to sanction the evasion tactics.

In the Bradley case the Supreme Court reversed. In the Green case the Supreme Court reversed. In the Cohen Memorial Hospital case, the Hill-Burton case, Judge Haynsworth was in the minority among his own colleagues.

Senator BURDICK. There were two you did not mention. Were they unanimous?

Representative RYAN. In Bradley two judges concurred in part and dissented in part. The Green case was a *per curiam* decision reversed in 391 U.S. 430.

Senator BURDICK. Have you studied these cases?

Representative RYAN. I have read excerpts from the cases and I have also studied several of them.

Senator BURDICK. Is it your opinion that any one of them or all of them fly in the face of established Supreme Court law?

Representative RYAN. I think that the cases which were reversed by the Supreme Court were reversed because they did not follow the mandate of the Supreme Court. That is the reason the Supreme Court reversed them.

Senator BURDICK. And it is your opinion that this law was already established by the Supreme Court?

Representative RYAN. In my opinion the law was established by the 1954 Supreme Court desegregation decision.

Senator ERVIN. That could not have possibly been true in respect to the Moses H. Cone Hospital case.

Representative RYAN. I agree with that exception.

Senator ERVIN. Yes.

Representative RYAN. Because this case was not related to the segregation of public schools. In addition, the Court of Appeals for the 4th Circuit held the "separate but equal" provision of the Hill-Burton Act unconstitutional, Judge Haynsworth and another judge dissenting.

Senator ERVIN. You cited racial bias.

Representative RYAN. Oh, yes; but it was under the Hill-Burton Act.

Senator ERVIN. Yes. But the Hill-Burton Act stated in express words that hospitals receiving funds under the Hill-Burton Act could segregate their patients according to race, and so the Moses H. Cone Hospital was built under the solemn promise made by the Congress of the United States that it was all right as long as they received patients of all races to segregate them and not make them sleep in the same beds or in the same wards, and so they built it on the face of a promise by Congress. Then years later the Supreme Court comes along and changes the interpretation which has been placed on the Equal Protection clause from 1868 down to 1954. So, Judge Haynsworth's ruling in the Moses H. Cone case was based upon the solemn contract made by Congress, and upon rulings that had been made over a period of from 1868 to 1954 by the Supreme Court.

Representative RYAN. In that case, if I may differ, sir; it was the Circuit Court of Appeals which 3 to 2 held the separate but equal provision of the Hill-Burton Act was unconstitutional and it was Judge Haynsworth who dissented from his colleagues in that 3 to 2 decision.

Senator ERVIN. But Judge Haynsworth stood on the ground that the pledge of Congress and prior Supreme Court decisions ought to be honered and I think they ought to be honored.

Did you consider that the case of *Coppage* v. *Franklin County* shows bias? In that case Judge Haynsworth virtually nullified the freedom-of-choice plan that had been adpoted there.

Representative RYAN. I do not have that case before me.

Senator ERVIN. Do you remember reading it?

Representative RYAN. I am not familiar with that case.

Senator ERVIN. Don't you think you ought to have read all his cases before you express an opinion as to his bias?

Representative RYAN. I have reviewed his decisions and the highlights of his decisions, and I am satisfied on the basis of his decisions that the position he has taken on crucial votes encouraged evasion and delay.

Senator ERVIN. You can read a couple of cases and come to a conclusion. I think you ought to read them all. Did you read the case of *Clements* v. *the City of Charleston*, where Judge Haynsworth voted to desegregate a public golf course? Do you recall that?

Representative RYAN. That is a decision which it would be hard not to make.

Senator ERVIN. Well, he made it. He did not show any racial bias, did he? He showed exactly the opposite, did he not?

Representative RYAN. I would say that in that case he followed the mandate of the Supreme Court.

Senator ERVIN. Did you read the case of *Standing County Board of Education* in which Judge Haynsworth voted to void the discriminatory discharge of a black teacher? Are you familiar with that case?

Representative RYAN. I think that it is clear that he may have, and has, voted on occasions in a case which I would agree with, but I am pointing out the highlights of his decisions which show a pattern of evasion in terms of desegregation of public schools.

Senator ERVIN. Do you think that the case of *Bowen* v. *County Board of Education* of Charles County, Va., where Judge Haynsworth

voted to integrate the faculty, upheld integration of the faculty shows racial bias?

Representative RYAN. There was a previous case, the *Bradley* case, in which he voted against desegregating the faculty. The Supreme Court upset that decision, so I assume that later he changed.

Senator ERVIN. Well, he changed whenever the Supreme Court changed, did he not? That is exactly the point I am trying to make. Did you read the case of *Warren* v. *the County School Board of Arlington County* where he voted to deny the contention of white students that there was discrimination in reverse in the drawing of school boundaries so as to include black children in the school districts? Or the case upheld against the Harkin Board of Education where he voted that all school boards admit all new students to the schools of their choice?

In other words, Mr. Ryan, I have to draw the inference, and I do not mean to be unjust, but I have to draw the inference that you do not do like a jury does. A jury is sworn to try a case on the basis of all the evidence. You pick out a little bit of the evidence here and there, and ignore the rest of it.

Representative RYAN. No, I completely disagree. I have singled out the major cases which reflect an attitude and a judicial sanctioning of the strategy of evasion and delay in the enforcement of the desegregation decisions of the Supreme Court, and that is my position.

Senator ERVIN. Well, you are not familiar with any of the cases where Judge Haynsworth handed down the kind of decisions you would have handed down if you had been in his place?

Representative RYAN. I am familiar with the fact that there were later decisions after the Supreme Court upset his earlier decisions.

Senator HART. I am sorry I got here late, Congressman.

Representative RYAN. Glad to see you, Senator.

Senator HART. I take it you would agree with Senator Ervin that, at least in one of those cases, Judge Haynsworth changed his position after the Supreme Court had established the proposition. I take it your concern is where would we be if it had been a Haynsworth Supreme Court to start with.

Representative RYAN. I think that is what we are facing now. Where will we be if it is a Haynsworth Supreme Court in the next 20 years.

Senator HART. Thank you.

Representative RYAN. Thank you very much.

Senator ERVIN. I think the country would be highly blessed by it. Thank you.

Representative RYAN. I thank you very much for your patience and the opportunity to express my views.

Mr. HOLLOMAN. Mr. Elliot Bredhoff, general counsel, Industrial Union Department, AFL–CIO.

Senator ERVIN. You may proceed.

TESTIMONY OF ELLIOT BREDHOFF, GENERAL COUNSEL, INDUSTRIAL UNION DEPARTMENT, AFL–CIO

Mr. BREDHOFF. Mr. Chairman and members of the committee——

Senator ERVIN. Identify yourself for the record.

Mr. BREDHOFF. My name is Elliot Bredhoff. I am general counsel of the Industrial Union Department, AFL–CIO, an organization whose affiliated unions represent over 5 million American workers of all races, religions, nationalities, and sexes spread throughout the breadth of our country. I would like to express my appreciation to the committee for affording me the opportunity to set forth the Industrial Union Department's strong opposition to the appointment of Judge Clement F. Haynsworth, Jr., to the Supreme Court.

You have already received a comprehensive statement from AFL–CIO President George Meany, which sets forth the AFL–CIO's opposition to Judge Haynsworth's nomination. Mr. Meany pointed out that Judge Haynsworth's decisions reveal a singularly unsupportable antilabor record, and a demonstrable indifference to the legitimate aspirations of black Americans. We do not wish to be repetitious; suffice it to say, we wholeheartedly endorse Mr. Meany's conclusions and the objective analysis upon which they rest.

Indeed, similar expressions of grave concern were publicly voiced by I. W. Abel, president of the Industrial Union Department and the United Steelworkers of America, on August 26, as follows:

> The United Steelworkers of America and the Industrial Union Department of the AFL–CIO regard the decision by the President to nominate Judge Haynsworth to the Supreme Court as extremely unfortunate for workers and minority groups, and we will urge the Senate to reject the nomination.
>
> Nomination to the Nation's highest court should be the climax of a distinguished legal career during which the nominee has served justice by protecting and advancing the rights of those seeking justice.
>
> However, in the present case, we believe the nomination is designed more to the plowing of domestic political fields than to the sowing of seeds of hope, and more to the placating of a particular viewpoint than to the cause of economic and social justice.
>
> * * *
>
> The Senate, as it considers and deliberates confirmation of Judge Haynsworth, should carefully weigh the full implications of the Judge's past decisions concerning the rights of workers and Negroes. In doing this, the Senate will conclude, as we do, that the Judge's record does not merit his confirmation.

I will ask, Mr. Chairman, that my entire statement be submitted for the record.

Senator ERVIN. Let the record show that the entire statement will be inserted in the record immediately after the oral testimony of the witness.

Mr. BREDHOFF. There is still another reason adduced by Mr. Meany—perhaps even more fundamental—which renders Judge Haynsworth unworthy of sitting on the highest court in our land. I refer here to the now already well publicized subject of Judge Haynsworth's "conflict of interest." This is of profound importance, not only from the standpoint of the particular appointment in issue, but also because it brings into play principles vital to the integrity of the entire judicial process. I shall direct my remarks today to this subject.

Mr. Chairman, I have some notes from which I will read. The main issue before this committee, Mr. Chairman, and before the Senate is to decide Judge Haynsworth's sensitivity to and his appreciation and concern for the proprieties and ethical conduct expected of Federal judges. This involves an examination of the following major areas:

His conflict of interest in the *Darlington* (*Deering Milliken*) case, his failure to disclose, his failure to disqualify.

Second, his purchase of Brunswick Corp. stock while the case involving that company was pending before him. This also constitutes a conflict of interest.

Third, other possible conflicts of interest stemming from stock ownership over the years.

We have only the September 1969 listing of Judge Haynsworth's stockholdings. Judge Haynsworth I understand has submitted to the committee data which will enable an examination of his stockholdings all through the years from the time he stepped onto the Bench. It seems to me, Mr. Chairman, the committee should examine that carefully to determine whether the loose practice with respect to the issues that we know about may have prevailed in other situations such as the *Nationwide Insurance* cases which Senator Bayh referred to yesterday.

Finally, we have to consider an adherence to the canons of judicial ethics, and whether Judge Haynsworth met the necessary requirements of the canons of judicial ethics.

Let me start with the *Darlington* case. This is an issue which must be passed upon based on everything that is known to date, regardless of what was shown by the investigations that were made in prior years.

Judge Haynsworth testified before this committee that even if he had known everything when the cases were before him, that he knows today, he would not have disqualified himself in the *Darlington* (*Deering-Milliken*) case. Thus, this committee must determine this issue of propriety on the assumption Judge Haynsworth knew in the past the full extent of the substantial business relationship between the Vend-A-Matic Company and Deering Milliken.

This is necessarily the case, because it is the Senate that is considering the fitness of the nominee for the Supreme Court, and the Senate is not considering the impact on a particular case that was pending in a court at a prior time.

Indeed there are many more facts known today. In Judge Sobeloff's letter to the counsel for the Textile Workers Union, it says in part in the next-to-the-last paragraph:

"Incidentally we are assured that Judge Haynsworth has had no active participation in the affairs of Carolina Vend-A-Matic."

In light of Judge Haynsworth's testimony, he must have minimized at least in his own mind, and certainly he must have minimized what he told his judicial colleagues, as to the extent of his active participation in the Vend-A-Matic Co. He did attend board of directors' meetings. Indeed he attended them more frequently after he was on the Bench than before. He did play a role in connection with the financial arrangements even after he stepped onto the Bench. He was a signator and a guarantor on large notes to back up loans that had been obtained by the Vend-A-Matic Co.

To my mind this indicates a rather active involvement and a keen interest in the success of this company. There was no indication on the face of Judge Sobeloff's letter that Judge Haynsworth owned stock in Vend-A-Matic. Judge Haynsworth did testify that his colleagues

knew he had an ownership interest in Vend-A-Matic, but not the proportion; namely one-seventh, or the extent or value of that proportion; namely approximately $450,000. Hence we must examine the situation afresh or de novo on the facts in the record, or which may still be developed in this record.

Now, what facts are in the record? Let me quickly tick off some 14 items regarding Judge Haynsworth's interest in Vend-A-Matic: $450,000 worth of stock, vice president of the company, member of the board of directors, his wife was the secretary of the company. We are not sure what his annual income was from Vend-A-Matic operations. I do not believe there is anything in the record to that effect and perhaps the committee should find out what was his annual income based on his investment.

Senator ERVIN. I think on that point that Judge Haynsworth has filed with the committee his income tax returns for a great many years.

Mr. BREDHOFF. That has not been made public to those outside the committee, Senator. But Judge Haynsworth did receive directors' fees of $2,600 in 1963 for less than a full year's activity, since he resigned as a director in October 1963. His wife did receive $1,500 as secretary of the company in 1962.

I am up to my sixth point.

Judge Haynsworth attended weekly board of directors' luncheon meetings as I said before more frequently after he was on the bench than before.

Seven, he was heavily committed, as I said before, as a signator on loans obtained from banks by Vend-A-Matic. This could have been as high perhaps as a few hundred thousand dollars, because Judge Haynsworth said the total loans exceeded $300,000, and only some of them were corporate notes rather than those backed up by personal signatures.

Eight, Judge Haynsworth continued to be active to some undefined extent after he was on the bench in arranging for loans and finances for Vend-A-Matic. The Vend-A-Matic general manager and vice president, and this is the ninth point, Mr. Dennis, came from Deering Milliken Mills; namely, Judson Mills.

Ten, Darlington Mills, another Deering Milliken mill, had a law firm which incorporated a Vend-A-Matic subsidiary in North Carolina. Three partners in that firm were incorporators and initially were on the board of directors.

Eleven, the mainstream of the customers of Vend-A-Matic were textile companies. Many were also clients of Judge Haynsworth's law firm. We all agree that the Darlington case was extremely important to all textile companies.

Twelve, Judge Haynsworth's law firm was counsel for Judson Mills while Judge Haynsworth was in the firm and indeed even to this day as I understand it.

Senator ERVIN. You mean you understand the judge is still in the law firm? I don't understand what your assertion means otherwise.

Mr. BREDHOFF. No. I mean that the law firm, Senator Ervin, is still counsel for Judson Mills.

Thirteen, the Vend-A-Matic company did $50,000 per year business in prior years, and that jumped to $100,000 in 1963.

Finally, 14, Judge Haynsworth was a trustee of the Vend-A-Matic profit-sharing and pension trust.

Now, I realize that it is repetitious of what has been said before, but I thought it might be helpful to pull together these 14 items which show the overwhelming interest of Judge Haynsworth in the Vend-A-Matic company, and in its dealings with its various customers.

Mr. Chairman and members of the committee, I believe that Judge Haynsworth had an enormous stake and interests in Carolina Vend-A-Matic. His large investment, his heavy exposure on the notes, his active participation in the executive and financial affairs of Vend-A-Matic certainly are as great as many executives of any business concern.

Vend-A-Matic was vitally and substantially interested in preserving $100,000 worth of business with Deering Milliken, and advancing its goodwill with Deering Milliken to preserve and expand its volume of business.

It also was vitally interested in keeping the large majority of its customers, mainly from the textile industry. As a major stockholder in Vend-A-Matic Judge Haynsworth had the same vital and substantial interest in preserving and expanding the Vend-A-Matic business with Deering Milliken and keeping the goodwill of other textile companies as the company itself had.

Thus Judge Haynsworth had a substantial interest indeed in keeping a litigant, Deering Milliken, happy in the case that was before him. Under 28 U.S. Code, section 455, it is my judgment that he had a substantial interest which required his disclosure and his disqualification, and I will talk about that more in a bit.

In addition, under section 455, aside from the language which deals with substantial interest, there is also language dealing with any connection with a litigant or its attorneys. Now, we indicated that Mr. Dennis was from Deering Milliken initially, and that the Judson Mill of Deering Milliken was a client of the judge at the time he was in law practice and it continued as a client of his law firm.

We indicated that the Darlington law firm was intimately tied in with Vend-A-Matic. In addition, the business dealings between Deering Milliken and Vend-A-Matic year in and year out were such as to constitute a relationship and connection between them, and therefore between Deering Milliken and Judge Haynsworth within the meaning of section 455 of the code.

Professor Frank and Judge Walsh say to the contrary. So, too, does Assistant Attorney General Rehnquist, but we submit that they did not have the total factual material that now has been brought to light.

Moreover, they are just plain wrong under the *Commonwealth Coatings* case and the canons of ethics. I would like to spend a few minutes on the *Commonwealth Coatings* case, Mr. Chairman and members of the committee, inasmuch as it is the *Commonwealth Coatings* case that is the governing interpretation of the statute involved and of the canons of judicial ethics that are applicable in this situation.

Let us bear in mind that there have been efforts to distinguish the *Commonwealth Coatings* case on the grounds it involves an arbitrator and on the grounds there are special rules for arbitrators which are not applicable to judges. Let us read a few passages to see how the effort to distinguish *Commonwealth Coatings* stacks up.

The case, in the main decision by Mr. Justice Black starts out with this sentence:

> At issue in this case is the question whether elementary requirements of impartiality, taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration.

The assumption of that opening sentence is that whatever the Court is going on to say with respect to the duties of an arbitrator a fortiori must be deemed to be applicable to a judge, and as the Court says, to a juror as well.

Quoting further from the Supreme Court decision:

> This third arbitrator, the supposedly neutral member of the panel conducted a large business in Puerto Rico in which he served as an engineering consultant for various people in connection with building construction projects. One of his regular customers in this business was the prime contractor that petitioner sued in this case. The relationship with the prime coutractor was in a sense sporadic in that the arbitrator's services were used only from time to time at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless the prime contractor's patronage was repeated and significant involving fees of about $12,000 over a period of four or five years.

Now, this is the same situation as what Professor Frank described as the third party situation. It is an arbitrator having an interest in a company which in turn does business or had done business with another company which was a litigant in the case.

Similarly, Judge Haynsworth had an interest in Vend-A-Matic which did business with Deering Milliken Mills, which was a litigant in the case before him.

Now, in terms of the amounts involved, the gross to the arbitrator's large firm in Puerto Rico was, let us say, an average of about $2,500 or $3,000 per year. If we even take the one-seventh interest of Judge Haynsworth in Vend-A-Matic and apply that to the $100,000 business done by Vend-A-Matic with the Deering Milliken Mills, we see that that comes to an amount of some $14,000 per year, so that even as to Judge Haynsworth's direct share in Vend-A-Matic, there was a far greater interest that he had through Vend-A-Matic in the relationship with Darlington and Deering Milliken than the arbitrator had in this *Commonwealth Coatings* situation.

Quoting further from the decision:

> An arbitration was held, but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner until after an award had been made.

The Court then goes on to quote the requirements of the U.S. Arbitration Act, section 10, which authorizes vacation of an award where it was procured by corruption, fraud, or undue means or where there was evident partiality in the arbitrators.

"Petitioner does not charge," said the Court, "that the third arbitrator was actually guilty of fraud or bias in deciding this case."

And the Court did not assume that he had any such fraud or bias involved in the case. However, the Court went on to say:

> We have no doubt that if a litigant can show that a foreman of a jury or a judge in a court of justice had unknown to the litigant any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by *Tumey* v. *Ohio*, 273 U.S. 510.

If I may interpolate again, thus as the Supreme Court states, there could be no question that this was a new doctrine being enunciated in 1968 as to the requirements of judicial behavior for judges. Rather it was a longstanding doctrine going back to *Tumey* v. *Ohio* which was in 1927 and clearly accepted with respect to judges, and the only question that the Supreme Court was struggling with was whether this rule of complete impartiality, disclosure and disqualification, if necessary, is applicable to arbitrators as it has long, long been applicable to judges.

Continuing further, the Supreme Court said in *Tumey* v. *Ohio:*

"This Court held that a conviction could not stand because a small part of the judge's income consisted of court fees collected from convicted defendants. Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant as the Court of Appeals apparently thought it was here, that 'the payments received were a very small part of [the arbitrator's] income.' For in Tumey the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the compensation involved there was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty.' "

Again an effort has been made by Professor Frank and I believe Judge Walsh, Assistant Attorney General Rehnquist and I guess Judge Haynsworth himself to show that unless there is a direct, immediate, pecuniary, and substantial gain or benefit to be derived from the outcome of that particular litigation that is before the judge, then the canons of judicial ethics and the requirements of the statute, section 455, are not applicable. But the language of the Supreme Court is clear, and I will repeat it:

"Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other parties in this case." A fortiori, Congress as well as the Nation expect similar compliance on the part of judges.

I will not read any further from the opinion except a couple of lines from the opinion of Mr. Justice White, concurred in by Mr. Justice Marshall concurring in the main opinion. Incidentally, the dissenting opinion was written by Mr. Justice Fortas. Mr. Justice White stated:

"The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of article III judges, or indeed of any judges."

Again a clear statement that if a rule is applicable to an arbitrator, of course it is applicable to a judge and to a juror as well.

Now, as I have stated, Mr. Chairman and members of the committee, Judge Haynsworth's interest was more substantial, was continuing

rather than sporadic, and was in effect at the time the case was before him. His failure to disclose or disqualify violated canon 33 as the Supreme Court stated in the Commonwealth case; I did not read it, but Senator Bayh quoted it many times in his questioning of witnesses, and possibly other canons as well.

His failure, Judge Haynsworth's failure to disclose or disqualify also violated section 455 as well as the canons. And still Judge Haynsworth said to this committee, and I do not believe he has retracted it, that he would do today exactly what he did in 1963. We submit that he would be in dereliction of the Supreme Court's governing ruling. We submit that this shows a lack of sensitivity to the highest ethical standards required of judges.

I have mentioned the efforts of Judge Walsh and Professor Frank and others to distinguish the *Commonwealth Coatings* case on the ground it involved an arbitrator. I think that effort falls flat on its face as you read the *Commonwealth* decision, but they also said one more thing. They somehow imported a special rule of interpretation of the statute, because of the doctrine of the duty to sit, the duty of a judge to sit.

Now, the Supreme Court certainly did not say that the basic rules of impartiality which were being applied to arbitrators in a third party situation in the Commonwealth case were being applied because they do not have a duty to sit as do judges.

The Supreme Court has stated that a similar third party interest held by a judge or a juror would have led to an upset of any decision for failure to disclose or to disqualify. The duty to sit certainly cannot override the plain disqualification and disclosure requirements of the statutes and the canons.

Obviously while the duty-to-sit doctrine means a judge cannot excuse himself for whimsical or remote reasons it cannot authorize or require a judge to sit where a conflict of interest is clear. That it is clear in the Deering Milliken situation is conclusively demonstrated we submit by the *Commonwealth Coatings* case.

There is another facet to the duty-to-sit argument which was made in an effort to distinguish the *Commonwealth Coatings* case. If there is such a strong duty, should not a judge see to it that he does not acquire securities and stocks which would lead to disqualifications in many, many cases, since any time you disqualify yourself, you are upsetting the very purposes of the duty-to-sit doctrine: namely, stability of selection of panels, having a full court for an en banc proceeding, et cetera; the various reasons given by Professor Frank and Judge Walsh.

But it seems to me that a concomitant of that duty is that a judge bend over backward not to acquire securities that are apt to be involved in litigation, therefore requiring him to disqualify himself, therefore doing violence to the duty-to-sit doctrine.

I would like to make one more comment on an aspect of the *Darlington* situation. Judge Haynsworth stated that he went out of his way to keep his interest in Vend-A-Matic as secret as possible. He divested himself of the various directorships he had in public corporations because he knew that that could not be kept secret. But he felt in the Vend-A-Matic case his interest, his office in the company, his vast

financial interest and his membership on the board of directors could be kept secret. He so instructed Mr. Dennis, according to the testimony.

Now, this leads to the possibility of the very abuses which the statute and the canons were designed to bar. It is the mere possibility or appearance of impropriety that must be avoided, even if there is no actual impropriety.

I am not saying that Judge Haynsworth resorted to secrecy in connection with his holding there because he intended to do certain things wrong, but what I am saying is that he left himself in a position which the public might think would lead to abuses.

We need only think of Judge Martin Manton and what a judge of his stripe might have done with a secret interest in a company not disclosed to anyone, or at least not disclosed to the public and to any litigant, to see the great dangers inherent in a judge seeking to keep only unto himself and his close associates the fact that he has such a vast interest in a particular company.

Now, if I may, Mr. Chairman, I would like to spend a few minutes on the *Brunswick Corporation* case. I will not repeat the facts. They are fresh in our minds after all the testimony yesterday.

Judge Haynsworth concedes that his interest was substantially within the meaning of the statute (section 455), and the applicable canons.

Judge Winter stated that he would not have purchased these securities while the case was still pending. Judge Haynsworth said he did not think of the pending suit at the time of the purchase.

We submit, and I think he finally conceded, that Judge Haynsworth should have had a system for testing precisely such potential conflict of interest situations in advance of any purchase, if indeed he felt compelled to participate so actively and substantially as an investor in corporate securities.

His portfolio we must recall is estimated at about $1 million. That was the least he could have done to avoid conflicts and an abundance of possible disqualifications which, as I have indicated, do violence to the duty-to-sit doctrine.

In other words, Judge Haynsworth should have selected investments not only which entailed no conflicts, but would not necessitate his disqualifying himself in light of the importance he attached to the doctrine that the judge has a duty to sit.

Judge Haynsworth did not have such a system to control his securities purchases. His broker was not even aware of the statutory and ethical requirements. In the final analysis, of course, Judge Haynsworth's investments and stock purchases are his responsibility and not his broker's.

After he purchased the Brunswick shares and later engaged in judicial actions in connection with the *Brunswick* case before him, Judge Haynsworth did realize the possible conflict. At that point Judge Haynsworth could have taken very simple steps to eliminate the problem. He could have sold the securities immediately. There was no problem in disposing of the stock. It simply would have meant perhaps an extra commission for the sale and perhaps another commission for the reinvestment of the proceeds of that particular sale. However, he did not do so.

The other alternative was to disclose to his fellow judges and to the litigants the fact that inadvertently, if we assume it was inadvertent, that he had purchased shares in a company involved in a case that was pending before him.

The losing litigant in that case surely felt the case was extremely important, since he went to the expense of filing a petition for certiorari.

Judge Haynsworth said he did not even consult his fellow judges, since he knew what they would have said; and yet Judge Winter told this committee he would not have bought these stocks in the first instance.

Is it not possible that if the matter had been mentioned to Judge Winter, Judge Winter would have urged Judge Haynsworth at least to disclose the situation to the litigants in the case? I believe the teaching of the *Commonwealth Coatings* case is that the judiciary as well as arbitrators should if anything err on the side of disclosure.

Judge Haynsworth's claim that there was no act of judicial discretion remaining in the case also bears an observation, and I must say that Judge Winter concurred with Judge Haynsworth in this claim. We must remember that there was an approval of an opinion, and its reasoning and its precedential impact that was invloved in the judicial actions which remained to be performed after Judge Haynsworth acquired the Brunswick shares.

I have always felt as an attorney that it surely does involve a considerable amount of judicial discretion to determine what reasoning and what language should back up a ruling in a particular case.

As concerns the petition for extension of time, the petitioners might have had some reasonable basis for not being in time in the filing of their petition. Here, too, the decisions I submit involve the exercise of new judicial discretion where one must determine whether a petitioner for an extension of time may have had a sound reason which would have excused a 30-day requirement or failure to meet a 30-day requirement in the statute or in the code.

I must conclude as to this case, as I did with respect to the *Darlington* case, that Judge Haynsworth violated the statute and he violated the canons by exercising judicial discretion in a case where he admittedly had a substantial interest in one of the parties.

If I understood Senator McClellan correctly yesterday, he, too, observed that Judge Haynsworth could be criticized for participating in the case after he realized he had the stock and the case was still before him. Judge Haynsworth's conduct here again showed too loose an attitude toward strict requirements of the statute and the canons of judicial ethics.

It is a further demonstration of his lack of the necessary deep concern for avoiding even any appearance of bias or partiality.

It may be of interest to this committee, turning to one other point, what Senator Griffin seems to think is the appropriate standard and what the penalty is for violation of a standard relating to a conflict of interest. I am sure it is no surprise to you, Senator Ervin, that Senator Griffin has introduced S. 2109, which is pending for consideration before the Subcommittee on Separation of Powers which you are privileged to chair, Senator Ervin, and I understand from the newspapers

that hearings will be held from September 30 to October 2 by your subcommittee with some very distinguished witnesses, Justices Reed, Whittaker, Clark, and Goldberg and possibly according to the paper even Chief Justice Warren.

The first part of that bill of Senator Griffin relates to financial disclosure, the second part to conflicts of interest.

I presume that Senator Griffin was incorporating and codifying what he deems to be sound practice and well accepted usage and conduct required by the judicial canons of ethics. I will read very briefly from the second portion of that proposed bill dealing with conflicts of interest:

"The conduct of a judge of the United States who participates in the adjudication of any motion, petition"—let us bear in mind the *Brunswick* case petition for extension of time—"the conduct of a judge of the United States who participates in the adjudication of any motion, petition, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, creditor, partner, organization in which he is serving as an officer, director, trustee, partner, consultant or employee or any person or organization with whom he is negotiating or has any arrangement concerning past or prospective employment"—and these are the key words—"has not an insubstantial financial interest, is inconsistent with the good behavior required by article III of the Constitution and shall be grounds for removal from office."

The there is a provision for exoneration from the chief judge of the court, or the Chief Justice of the Supreme Court with respect to chief judges of courts of appeal, where a judge is not sure whether he falls within the ambit of that language. But as interpreted by the Supreme Court in the *Commonwealth* case, it seems to me that Judge Haynsworth's interest in the Deering Milliken situation through his one-seventh ownership interest in Vend-A-Matic would seem to fall under this language of "not an insubstantial financial interest" as propounded by Senator Griffin.

Also, Judge Haynsworth's interest in the *Brunswick* situation surely was not an insubstantial financial interest. It would require full disclosure and a written determination, as I have stated, to be exonerated. Of course, as I say, this is only a proposed bill, but it does reflect on what at least Senator Griffin feels are appropriate standards of disclosure and disqualification applicable to the judiciary.

I further submit that Senator Griffin unquestionably was relying upon the standards that have been in effect constitutionally all through the years.

I have a few comments on the canons of the ethics. Canon 4 deals with avoidance of impropriety. There is a formal ruling No. 89 of the American Bar Association which says it is improper for an attorney to make a loan to a judge before whom he practices or for the judge to accept such a loan.

Now, I am not contending that Judge Haynsworth accepted a loan from any attorney, but I believe the committee should inquire as to whether Judge Haynsworth, in connection with his making financial arrangements for Vend-A-Matic, may have had dealings with attorneys for banks, for example, or in the process of obtaining these loans.

Then there is the famous formal opinion No. 170 which has been read here several times. I will not repeat it, but I will say that the judge's interests in the Brunswick stock, his interest possibly in the Nationwide Insurance Co., and possibly in other companies would seem to violate Canon 4, and the formal opinion No. 170 thereunder.

Canon 13 deals with kinship or influence. There is an informal ruling No. 594 which states in part that where a regular client of the firm at the time he was a member is a party to the case, the judge should not sit on a case before him.

Now, Judson Mills, as has been pointed out many times here, was a client at the time the judge was in the firm, and continued as a client of the judge's former firm, and yet Judson Mills being a subsidiary of Deering Milliken, the judge sat in a case involving Deering Milliken.

I believe there are a few other cases involving Judson. I think they are patent cases, which one of my colleagues at the labor bar will allude to, which also involve a clear violation of this Canon 13.

Canon 26 has been read here many times, that is the apt-to-be-involved-in-litigation clause that has been spoken about. Now, as to the J. P. Stevens stock, Judge Haynsworth said that he did not find it necessary to sell the stock because he would have disqualified himself in any event in any J. P. Stevens case. But could not the same thing have been said about the requirement of the judicial conference, that a judge shall not be a director in a particular company? Isn't it fair to say that Judge Haynsworth would not have sat in any case involving Vend-A-Matic, and why couldn't he have continued as a director of that company?

The fact is he felt compelled to resign as a director of Vend-A-Matic when the judicial conference instructed all judges to resign such directorship, and the fact is that Canon 26 required him to divest himself of stock in a company which was known and is known to be as litigious as almost any company in this country.

Similarly, as I have indicated previously, the Brunswick stock, and stock in other companies should not have been purchased because they were apt to be involved in litigation, because the companies were apt to be involved in litigation, thus requiring disqualifications, thus flying in the face of the duty-to-sit doctrine.

I would like to say a word at this point about a man with whom I was blessed to be associated. Justice Goldberg was my senior partner for many years, and his name has been mentioned very laudably before this committee many times. Judge Haynsworth said yesterday that the fact that Justice Goldberg participated in labor cases was not to be held against him, thus implying it is all right for Judge Haynsworth to have participated in the *Darlington* case.

But, Mr. Chairman and members of this committee, Mr. Justice Goldberg never sat on a case involving any company in which he had an interest, or involving any company which did business with another company in which Mr. Justice Goldberg may have had an interest. He never sat in any cases involving his former law firm. He never sat on a case involving former clients, and that includes casual clients or local clients as well as regular clients.

Judge Haynsworth tried to make a distinction with respect to the Judson Mills client, that after Deering Milliken took over it became

a local rather than a national type client, but it was still a regular client.

Now, in the *Darlington* case the record is clear as to Justice Goldberg's disqualification, but let me tell you about a few others.

In the *Wittstein* case, and we have someone who will testify who was personally involved, which was decided in 1964, Mr. Justice Goldberg disqualified himself because it involved the Musicians' Union. The Musicians' Union had never been a client of Mr. Justice Goldberg, but he did sit at one time back in the late 1950's as an arbitrator in an internal dispute involving a local and the international of the Musicians' Union. The international union did pay him a fee for having served as an arbitrator. Because of that, what you might call tenuous, remote relationship Justice Goldberg felt compelled to excuse himself from that case.

There was a case before the Supreme Court known as the *Tree Fruits* case. Now none of the parties in that case had been clients of the justice. His law firm was not involved in the case at all. But because his law firm was involved in another case which may have involved the same point, which did involve the same point, the *Perfection Mattress* case, Justice Goldberg decided not to sit in that case.

Just one more example. There was the Railroad Arbitration Statute which was challenged in the Supreme Court. Justice Goldberg disqualified himself from that case because his name had been mentioned at one time as a potential arbitrator. It was mentioned at the time he was a sitting Justice on the Supreme Court. I just thought I would cite that by way of comparison of the standards one justice set for himself and what another justice, what another judge, namely Judge Haynsworth, set for himself.

I will turn now to the latter portion of my prepared testimony on page 12.

Senator THURMOND. Mr. Chairman, could I just ask at what time are we going to recess?

Senator ERVIN. I had intended to recess at 12:30, that is the usual time, but I do not know how much more the witness has.

Mr. BREDHOFF. This will take about another 5 minutes.

Senator THURMOND. I have no questions of this witness but I want to find out at what time will we reassemble?

Senator ERVIN. At 2:30.

Mr. BREDHOFF. An illuminating lesson regarding conflicts of interest among private citizens may be derived from the reporting provisions of the Labor Management Reporting and Disclosure Act of 1959, the Landrum-Griffin Act, section 202(a), requires annual reports to be filed with the Secretary of Labor by every officer and key employee of a labor organization disclosing several specified conflict of interest situations involving him, his spouse, or minor child. The requirement which bears on the issue before this committee in the *Darlington* case is subsection 3. Union officers are required to disclose any security held or income derived from a company which does substantial business with an employer represented by the union.

That is the same third party situation involved in the *Darlington* case.

Under section 202(b), exceptions to the reporting requirements are made for investments in securities traded on a securities exchange.

The reports are made public information under section 205. Criminal (sec. 209) and civil (sec. 210) enforcement sanctions are provided for violators of the reporting requirements.

In explaining the need for this requirement, the Senate committee reporting out the bill said:

> The hearings before the McClellan committee brought to light a number of instances in which union officials gained personal profit from a business which dealt with the very same employers with whom they engaged in collective bargaining on behalf of the union. The basic objection to this situation, as stated by the AFL–CIO Ethical Practices Committee, is—the possibility that the trade union official may be given special favors or contracts by the employer in return for less than a discharge of his obligation as a trade union leader. (S. Rept. No. 187, 86th Cong., 1st sess., p. 15.)

This same "basic objection" exists when a judge sits on a case involving a customer of his company. There is "the possibility that the (judge) may be given special favors or contracts by the (customer) in return for less than a discharge of his obligations as a (judge)."

I might add, Senator Ervin, that under the Ethical Practices Codes of the AFL–CIO, not only must there be disclosure, but I would like to read paragraph 3 of code 4 which says:

> No responsible trade union official should own or have a substantial business interest in a business enterprise, a substantial part of which consists of buying from, selling to or otherwise dealing with the business enterprise with which his union bargains collectively.

Not only does the law require disclosure in that third party situation, but our own internal codes, which I am sorry to say no management organization comes anywhere close to following, but our own internal codes bar an officer or a key employee from even holding such an interest in that third party situation.

Just as the labor official has to disclose his conflict for the benefit of the labor organization which might be adversely affected thereby, it was incumbent on Judge Haynsworth to disclose his conflict of interest to the litigants who might be adversely affected—the union and the NLRB. This he failed to do.

I will skip over the next paragraph since it talks about disqualification that was required on the part of a judge which I have already spoken about.

I would like to pose a hypothetical situation for the committee's consideration, and invite your reflection upon its relevance to the situation at hand.

Let us suppose that an attorney who represented labor unions had established, together with his law partners and others, a company to serve as administrator for pension and welfare funds. The attorney held a 15 percent stock interest in the company and was a vice president and director thereof. The company secured many contracts from unions to administer such funds. Several years after formation of the company, the attorney became a Federal circuit judge, but he retained his directorship, office, and stock interest in the company.

Now, let us suppose further that the judge was called upon to decide an appeal from a multimillion-dollar judgment against a union in favor of an employer. His company had contracts with that union to administer pension and welfare funds.

Without disclosing his stock interest and office in the company to the litigants or the public, or disqualifying himself, the judge cast the deciding vote in the case; ruling in favor of the union and setting aside the monetary judgment.

It seems to me that whenever the facts of the above-hypothetical situation might subsequently come to light, there would be a loud public denunciation of the judge's conduct. The outcry undobutedly would be led by the distinguished members of this committee and others vitally concerned with the sanctity and integrity of the judicial process.

And properly so, for our hypothetical judge had a most obvious conflict of interest. His company might have suffered retribution from the union if the judge had upheld the monetary judgment against the international union; conversely, the company might have increased its business as a result of the good will generated by a favorable judgment. It was this mere possibility of impact—good or bad—on the judge's company, and not necessarily the actuality thereof, which constituted the conflict. There can be no question that even minimal standards of judicial ethics required the judge to disqualify himself in our hypothetical case.

So, too, it must be with respect to Judge Haynsworth. It was the mere possibility of retribution by Deering-Milliken against Carolina Vend-A-Matic, or further gain for Vend-A-Matic from Deering-Milliken, and not the actuality thereof, which constituted his conflict of interest in a case involving a subsidiary of Deering-Milliken.

We need not consider whether the hypothetical judge's obviously unethical conduct in the face of such a clear conflict of interest, would affect his tenure on his court. But it is safe to predict that such a judge would not be rewarded with a Supreme Court appointment, and surely would not be confirmed by the Senate if somehow he managed to obtain a Presidential nod.

Judge Haynsworth's conflict of interest and unethical conduct in favor of an employer were identical to that in favor of a union by the judge in our hypothetical case. If we are correct in our assumption that our hypothetical judge could not win confirmation for a Supreme Court appointment because of his unethical conduct evenhanded standards require the same result for Judge Haynsworth.

For the foregoing reasons, Mr. Chairman, we urge this committee to refuse to confirm the appointment of Judge Clement F. Haynsworth, Jr., to the Supreme Court of the United States.

Thank you very much for your patience.

(The prepared statement of Mr. Bredhoff follows:)

STATEMENT OF ELLIOT BREDHOFF, GENERAL COUNSEL, INDUSTRIAL UNION DEPARTMENT, AFL–CIO

Mr. Chairman and members of the committee:

My name is Elliot Bredhoff. I am General Counsel of the Industrial Union Department, AFL–CIO, an organization whose affiliated unions represent over five million American workers of all races, religions, nationalities and sexes spread thruoghout the breadth of our country. I would like to express my appreciation to the Committee for affording me the opportunity to set forth the Industrial Union Department's strong opposition to the appointment of Judge Clement F. Haynsworth, Jr. to the Supreme Court.

You have already received a comprehensive statement from AFL–CIO President George Meany, which sets forth the AFL–CIO's opposition to Judge Hayns-

worth's nomination. Mr. Meany pointed out that Judge Haynsworth's decisions reveal a singularly unsupportable antilabor record, and a demonstrable indifference to the legitimate aspirations of Black Americans. We do not wish to be repetitious; suffice it to say, we wholeheartedly endorse Mr. Meany's conclusions and the objective analysis upon which they rest.

Indeed, similar expressions of grave concern were publicly voiced by I. W. Abel, President of the Industrial Union Department and the United Steelworkers of America, on August 26, as follows:

"The United Steelworkers of America and the Industrial Union Department of the AFL–CIO regard the decision by the President to nominate Judge Haynsworth to the Supreme Court as extremely unfortunate for workers and minority groups, and we will urge the Senate to reject the nomination.

"Nomination to the Nation's highest court should be the climax of a distinguished legal career during which the nominee has served justice by protecting and advancing the rights of those seeking justice.

"However, in the present case, we believe the nomination is designed more to the plowing of domestic political fields than to the sowing of seeds of hope, and more to the placating of a particular viewpoint than to the cause of economic and social justice.

* * * * * * *

"The Senate, as it considers and deliberates confirmation of Judge Haynsworth, should carefully weigh the full implications of the Judge's past decisions concerning the rights of workers and Negroes. In doing this, the Senate will conclude, as we do, that the Judge's record does not merit his confirmation."

There is still another reason adduced by Mr. Meany—perhaps even more fundamental—which renders Judge Haynsworth unworthy of sitting on the highest court in our land. I refer here to the now already well publicized subject of Judge Haynsworth's "conflict of interest." This is of profound importance, not only from the standpoint of the particular appointment in issue, but also because it brings into play principles vital to the integrity of the entire judicial process. I shall direct my remarks today to this subject.

I have had an opportunity to read the legal opinion tendered to the Committee by Assistant Attorney General Rehnquist. I was startled to find that opinion omits the most important precedent—a decision rendered by the United States Supreme Court only last year.

In *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 US 145 (1968), the Supreme Court ruled upon an alleged conflict of interest by a private arbitrator; in its opinion it analogized to the standards which govern the behavior of judges. In this case, it was shown that one of the parties to the arbitration was a "regular (business) customer" of the arbitrator, who was also an engineering consultant. The "relationship . . . was in a sense sporadic in that the arbitrator's services were used only . . . at irregular intervals, and there had been no dealings between them for about a year immediately preceding the arbitration. Nevertheless, the prime contractor's patronage was repeated and significant, involving fees of about $12,000 over a period of four or five years . . ." Thus, the arbitrator's "interest" in one of the parties was less substantial and more sporadic than that involving Judge Haynsworth.

Section 10 of the United States Arbitration Act authorizes the revocation of an award where it was "procured by corruption, fraud, or undue means" or "where there was evident partiality . . . in the arbitration." Invoking this provision, the Supreme Court held that the award rendered in the case should be set aside since the arbitrator had not followed "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." The majority opinion was written by Mr. Justice Black. A dissenting opinion was written by Mr. Justice Fortas. In the majority opinion, the Court reasoned:

". . . neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by *Tumey* v. *Ohio*, 273 US 510 (1927), where . . . the Court held that a decision should be set aside where there is the 'slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the

compensation involved there was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . .' Since, in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same concept in the broad statutory language that governs arbitration proceedings and provides that an award can be set aside on the basis of 'evident partiality' or the use of 'undue means'" (emphasis in the original).

In support of its conclusiou, the Court relied, among other things, ou Canon 33 of the American Bar Association's Canons of Judicial Ethics, which provides: ". . . (A judge) should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element iu influencing his judicial conduct."

As the Court noted, "this canon of judicial ethics rest[s] upon the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias."

It is interesting to note that the legal opinion of Assistant Attorney General Rehnquist not only fails to cite *Commonwealth Coating*, but also fails to cite *Tumey* v. *Ohio*, which the Supreme Court found to be the controlling precedent. Furthermore, while the legal opinion cites and distinguisbes two canons of Judicial Ethics, it does not cite Canon 33, which the Supreme Court found the most pertinent.

Surely, uo one iu this hearing room would even suggest that judges—and most particularly prospective appointees to the Supreme Court—should be held accountable to a *lesser* standard of ethical conduct than commercial arbitrators. On the contrary, the public demands and is entitled to a system of justice under which an individual sitting in judgment is free from even the appearance of bias or favoritism. It goes witbout saying that this is the only way to assure and foster public confidence in the court system.

Applying the Supreme Court's principles to the facts disclosed in connection with Judge Haynsworth participation in *Darlington Mfg. Co.* v. *NLRB*, 325 F.2d 682 (1963), I am constrained to conclude that his conduct falls far short of the mark.

First, Judge Haynsworth's law firm, in which he was the senior partner in 1956, was listed in the Martindale Hubbell Directory for that year as counsel to numerous textile mills and companies, including Judson Mills, which was an integral part of the expansive Deering Milliken enterprise. Solely on the basis of this firm's former representation of a Deering Milliken mill, Judge Haynsworth should have disqualified himself from the *Darlington* case. Nothing less would have satisfied the 33d Canon of Judicial Ethics which I have quoted above.

Indeed, as the AFL–CIO has pointed out, Mr. Justice Goldberg (who, I am proud to declare, was my senior partner prior to his assumption of public office) disqualified himself from the *Darlington* case when it reached the Supreme Court. He did so for precisely the reason that, many years before, his former law firm had handled unrelated litigation for the Textile Workers Union.

By contrast, notwithstanding Judge Haynsworth's firm's relationship with a party in interest in the litigation pending before him, Judge Haynsworth failed to advise the Textile Workers Union of this fact—let alone to disqualify himself.

Secondly, at the time that Judge Haynsworth heard *Darlington* on the merits in 1963, he was a director and First Vice President of Carolina Vend-A-Matic Co. and owned a one-seventh share of that company's stock. The stock was valued at approximately $450,000 in 1964. Carolina Vend-A-Matic, in turn, had an established business relationship with Deering Milliken and was doing approximately $50,000 worth of gross sales annually in Deering Milliken plants. Such gross sales increased to $100,000 in 1963.

Further, Judge Hayusworth's relationship with Carolina Vend-A-Matic was of long standing; indeed, it was he, along with six other associates, who actually established that company in 1950. And it was Judge Haynsworth, along with three of his law partners (one of whom became President) who constituted four of the original seven members of the Board of Directors.

On these facts alone, Judge Haynsworth's financial ties with Deering Milliken were, without question far more continuous and substantial than those between the arbitrator and the prime contractor which the Supreme Court held required disqualification in *Commonwealth Coatings*.

How then, one naturally wonders, has Judge Haynsworth avoided public censure? The answer lies, I submit, in the mistaken belief, recently circulated

in the news media, that this entire matter was the subject of a Justice Department investigation in 1964, which allegedly cleared Judge Haynsworth of any conflict of interest, and that the opponents of the Haynsworth nomination are seeking to reopen a file long since closed.

This is simply not so: it rests on a totally erroneous conception of the 1964 investigation. That investigation was prompted by anonymous information received by the Textile Workers and transmitted to Chief Judge Sobeloff of the Court of Appeals for the Fourth Circuit. The anonymous information was to the effect that Judge Haynsworth received a bribe or pay-off from Deering Milliken for his participation in the *Darlington* case by the award of new contracts from Deering Milliken to Carolina Vend-A-Matic, whereby the latter would supply vending machines to *all* Deering Milliken mills.

Not surprisingly, the investigation was confined to ascertaining the accuracy of the bribery allegation: the facts revealed there was no substance to the allegation and the matter was dropped, although it did appear that Carolina Vend-A-Matic enjoyed a substantial increase in business from Deering Milliken while the case was pending.

Significantly, however, the more narrow, and entirely separate, question which is now in issue—namely, whether Judge Haynsworth should have disqualified himself because of the conflict of interest—was never investigated nor considered. This crucial distinction apparently has eluded many people, including among them, the advisors to President Nixon who, in announcing the nomination, stated that the issue had been resolved in 1964. It was only *after* the nomination that the conflict of interest issue began to receive the attention it deserves.

I have previously alluded to Mr. Rehnquist's surprisingly incomplete legal memorandum. I would now like to examine it in somewhat greater detail. The opinion letter analyzes Judge Haynsworth's conduct solely in terms of two standards:

(1) 28 U.S.C. 455 which provides that: "Any justice or judge of the United States shall disqualify himself *in any case* in which he has a *substantial* interest, has been of counsel, is or has been a material witness, or is so related to or *connected with any party* or his *attorney* as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceedings therein." (Emphasis added.) And

(2) Canon 29 of the Canons of Judicial Ethics, which provides that: "A judge should abstain from performing or taking part in any judicial act in which his *personal interests* are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy." (Emphasis added.)

According to the opinion letter "(t)he 'substantial interest' referred to in the statute and the 'personal interest' referred to in the canon is a pecuniary, material interest in the litigation." Such a narrow, woodenly rigid construction, which stresses only the direct and substantial financial interest in the actual parties before the court, may accord with common law principles in construing private contracts. But it is singularly ill-suited for purposes of assuring the integrity of the entire judicial process.

Indeed, I find it hard to believe that Mr. Rehnquist could have endorsed such a weak standard. First, it runs completely counter to the high standard of conduct required, not only of judges, but arbitrators as well, by the Supreme Court decisions previously discussed, which, as noted, are conspicuously absent from Mr. Rehnquist's letter.

Second, it fails to mention—let alone even attempt to reconcile—Judge Haynsworth's actions under the basic standards of conduct required by the 33rd Canon of Judicial Ethics which I quoted previously.

Third, apart from the disqualification question, the opinion letter neglects to take into account Judge Haynsworth's obligation to disclose.

Fourth, and perhaps most important, it constitutes an open invitation to public distrust of the judicial system by endorsing a code of ethics tailored to the lowest possible common denominator in assessing the personal behavior of our judges.

Finally, Mr. Rehnquist's memorandum appears to assume that Judge Haynsworth breached the barrier only once. This is not the case. Two years earlier, he sat on a preliminary appeal arising out of the same *Darlington* dispute, *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (1961). In that case, Judge Haynsworth wrote the decision and his ruling forbade the NLRB General Counsel from intro-

ducing additional evidence in the hearing before the NLRB in support of his charges against the company. To what extent this ruling enabled the company to escape even further liability will, of course, never be known.

In contrast to Mr. Rehnquist's views, an illuminating lesson regarding conflicts of interest among private citizens may be derived from the reporting provisions of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).

Section 202(a) requires annual reports to be filed with the Secretary of Labor by every officer and key employee of a labor organization disclosing several specified conflict of interest situations involving him, his spouse or minor child. The requirement which bears on the issue before this committee in the *Darlington* case is subsection 3. Union officers are required to disclose any security held or income derived from a company which does substantial business with an employer represented by the Union.

Under Section 202(b), exceptions to the reporting requirements are made for investments in securities traded on a securities exchange.

The reports are made public information under Section 205. Criminal (Section 209) and civil (Section 210) enforcement sanctions are provided for violators of the reporting requirements.

In explaining the need for this requirement, the Senate Committee reporting out the bill said: "The hearings before the McClellan committee brought to light a number of instances in which union officials gained personal profit from a business which dealt with the very same employers with whom they engaged in collective bargaining on behalf of the union. The basic objection to this situation, as stated by the AFL-CIO Ethical Practices Committee, is the possibility that the trade union official may be given special favors or contracts by the employer in return for less than a discharge of his obligation as a trade union leader." S. Rep. No. 187, 86th Cong., 1st sess., p. 15)

This same "basic objection" exists when a judge sits on a case involving a customer of his company. There is "the possibility that the [judge] may be given special favors or contracts by the [customer] in return for less than a discharge of his obligations as a [judge]."

Just as the labor official has to disclose his conflict for the benefit of the labor organization which might be adversely affected thereby, it was incumbent on Judge Haynsworth to disclose his conflict of interest to the litigants who might be adversely affected—the union and the NLRB. This he failed to do.

Moreover, it was incumbent on Judge Haynsworth to go further and disqualify himself from the case, even if he had made full disclosure, let alone when he had made none to the parties or the public. Unlike the powers available to a labor organization to react to a disclosed conflict of interest by an officer or key employee, enforcement of the strictures against conflicts of interest on the part of a judge is left to the judge himself. It is expected that he will act with utter prudence and scrupulousness in self-enforcement of these strictures. This too Judge Haynsworth neglected to do, despite his involvement in such a direct and crucial conflict of interest.

I would like to pose a hypothetical situation for the Committee's consideration, and invite your reflection upon its relevance to the situation at hand.

Let us suppose that an attorney who represented labor unions had established, together with his law partners and others, a company to serve as administrator for pension and welfare funds. The attorney held a 15% stock interest in the company and was a vice president and director thereof. The company secured many contracts from unions to administer such funds. Several years after formation of the company, the attorney became a federal circuit judge, but he retained his directorship, office and stock interest in the company.

Now, let us suppose further that the judge was called upon to decide an appeal from a multi-million dollar judgment against a union in favor of an employer. His company had contracts with that union to administer pension and welfare funds.

Without disclosing his stock interest and office in the company to the litigants or the public, or disqualifying himself, the judge cast the deciding vote in the case: ruling in favor of the union and setting aside the monetary judgment.

It seems to me that whenever the facts of the above hypothetical situation might subsequently come to light, there would be a loud public denunciation of

the judge's conduct. The outcry undoubtedly would be led by the distinguished members of this Committee and others vitally concerned with the sanctity and integrity of the judicial process.

And properly so, for our hypothetical judge had a most obvious conflict of interest. His company might have suffered retribution from the union if the judge had upheld the monetary judgment against the international union; conversely, the company might have increased its business as a result of the good will generated by a favorable judgment. It was this mere possibility of impact—good or bad—on the judge's company, and not necessarily the actuality thereof, which constituted the conflict. There can be no question that even minimal standards of judicial ethics required the judge to disqualify himself in our hypothetical case.

So, too, it must be with respect to Judge Haynsworth. It was the mere possibility of retribution by Deering-Milliken against Carolina Vend-A-Matic, or further gain for Vend-A-Matic from Deering-Milliken, and not the actuality thereof, which constituted his conflict of interest in a case involving a subsidiary of Deering-Milliken.

As the Supreme Court observed in *In Re Murchison*, 349 U.S. 133 (yet another case not cited in Mr. Rehnquist's opinion letter):

". . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome . . . This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U.S. 11, 14."

We need not consider whether the hypothetical judge's obviously unethical conduct in the face of such a clear conflict of interest, would affect his tenure on his court. But it is safe to predict that such a judge would not be rewarded with a Supreme Court appointment, and surely would not be confirmed by the Senate if somehow he managed to obtain a Presidential nod.

Judge Haynworth's conflict of interest and unethical conduct in favor of an employer were identical to that in favor of a union by the judge in our hypothetical case. If we are correct in our assumption that our hypothetical judge could not win confirmation for a Supreme Court appointment because of his unethical conduct, even-handed standards require the same result for Judge Haynsworth.

For the foregoing reasons, Mr. Chairman, we urge this Committee to refuse to confirm the appointment of Judge Clement F. Haynsworth, Jr., to the Supreme Court of the United States.

Senator ERVIN. Your opinion as to the ethics of Judge Haynsworth is based upon the facts that have been presented to the committee entirely; is it not?

Mr. BREDHOFF. Yes, sir.

Senator ERVIN. You realize, of course, that we have had the opinion of Judge Walsh and the opinion of the officers of the ABA on this point. And after all that is a question for the committee to decide; is it not?

Mr. BREDHOFF. That is precisely so, Senator.

Senator ERVIN. I will ask no questions on that. I just have to confess my inability to see, irrespective of the question of the ethics, where anything Judge Haynsworth did in the *Darlington* cases show any antiunion bias because his decisions were against Deering-Milliken.

Mr. BREDHOFF. Senator Ervin, I did not prepare the labor analysis.

Mr. Harris did. But let me make this one comment, because you have mentioned this many, many times.

In the first *Darlington* case, it is true that Judge Haynsworth's opinion partially reversed the district judge who had barred the NLRB from holding any hearing at all, but that was the first time the National Labor Relations Board has ever been in any way circumscribed in holding a hearing, and Judge Haynsworth did circumscribe the content of the hearing. To my knowledge, and this can be checked with the Board, the Board has never been so circumscribed since that time.

Senator ERVIN. That of course is a question of interpretation of the record in that case. The way I interpret the record is that Judge Haynsworth allowed the hearing to proceed as to the matters which the union presented. This was a decision in favor of the unions.

I will absolve the union which you are connected with from any connection with the following statement, because so far as I know during the hearings on the McClellan committee there was no evidence adduced at any time that reflected in the slightest degree upon your union or any of its officers. However, the provisions of the Landrum-Griffin bill which you read, were enacted into law because of the fact that the committee had found in cases of some unions, which constituted as I said a minority, a decided minority, that there were dealings between some union officers and the companies they were making collective bargaining agreements with. In other words, there was evidence there that they were making sweetheart contracts, and so that was the reason for the inclusion in the Landrum-Griffin Act of the provision you read.

Mr. BREDHOFF. And the record before this committee shows that Judge Haynsworth had precisely a similar interest, and it shows that it was a substantial interest under the section of the Code and the canons of ethics.

Senator ERVIN. Do you have any questions?

Senator HART. No. I think that your analysis does incorporate fully the facts as they have been presented. As Senator Ervin says, there may be agreement or disagreement as to what those facts should persuade members of the committee to do, but they are accurate. It was an intriguing hypothetical case, too.

Senator ERVIN. Thank you very much.

Mr. BREDHOFF. Thank you.

Senator ERVIN. The committee will stand in recess until 2:30.

(Whereupon, at 12:55 p.m. the committee recessed, to reconvene at 2:30 p.m. on the same day.)

AFTERNOON SESSION

The CHAIRMAN. The committee will come to order.

Identify yourself for the record.

Senator HART. I would like to introduce the witness, Mr. Chairman.

I am delighted to welcome, and present to you the general counsel for the United Automobile Workers, whose statement we have, and whom I have known for a good many years and respect greatly, Mr. Stephen Schlossberg.

TESTIMONY OF STEPHEN I. SCHLOSSBERG, GENERAL COUNSEL, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

Mr. SCHLOSSBERG. Thank you, Senator Hart.

The CHAIRMAN. You may proceed, sir.

Mr. SCHLOSSBERG. Thank you, Mr. Chairman.

The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) urges this committee and, through it, the Senate of the United States, to deny confirmation to Judge Haynsworth.

I think, Mr. Chairman, if you will permit me before going any further with the statement which I have handed you, I should tell you what we feel is the key issue at stake here. We feel, Mr. Chairman, that we have today, as a result of the developments with respect to the sitting Justice who vacated his seat, and that seat you are considering now filling with a Presidential nominee, Judge Haynsworth, we have before us a crisis of credibility.

The people of this country, the young people, the students, the disillusioned people, the disinherited people, the intellectuals, people in all walks of life, want to know—is a northern liberal judge, a sitting Supreme Court Justice, to be judged by the same standards as a southern conservative or reactionary judge?

The crisis of credibility is—is there anywhere in the stablishment that we can turn to get this kind of evenhanded judgment of judicial nominees?

Whether the bar association, which wrote in its July editorial that—

> The drafters of the canons of judicial ethics must have had in mind the apothegm about Caesar's wife when they provided in canon 4 a judge's official conduct must be free from impropriety and the appearance of impropriety.

When they say further on—

> For it was the possible impropriety that appeared in the conduct of Justice Fortas rather than any wrong-doing itself that shook confidence in him and reflected upon the Supreme Court.

That same Bar Association has sent Judge Walsh here today, not today, excuse me, to these hearings, to apologize for out-and-out breaches of the canons of professional ethics.

What are the young people and the students of America going to say when they see a transcript, a record come out from this committee where a judicial nominee, nominated by the President of the United States, stands up on the first day of the hearing before the Judiciary Committee and admits that he deliberately said to a subcommittee of the Judiciary Committee, Senator Tydings' subcommittee, "When I came to the Bench I divested myself of all directorships of corporations." That is a very deliberate statement, and a judge is trained to make deliberate statements.

When that judge made that statement and later stood here before this committee and said, "Well, Mr. Tydings, at that time I had gotten rid of my directorships," he knew what he was saying when he said it and he did not apologize sufficiently to this committee.

I suggest to you that when he wrote you, Senator Eastland, in answer to a query from Senator Hart and Senator Tydings about his financial affairs, when he wrote you that he never, never sat upon a case in which he had a direct financial interest, and then later came here and elaborately explained his participation in the *Brunswick* case, that we have another crisis in credibility with a nominee for the Supreme Court of the United States.

Contrast also in the case of Fortas, of Justice Fortas, the ruminations and rumors of Justice Department activities, and the apologies by the Justice Department in this case. Contrast, if you will, Mr. Chairman, this paragraph in the letter written to Senator Hruska on September 5th by the Assistant Attorney General. I read only part of the paragraph: "The clearest case is one in which the judge is a party to the lawsuit." Obviously he may not sit in such a case. Little different is the case in which the judge owns a significant amount of stock in a corporation which is a party to the lawsuit before him. He too must excuse himself. Parties to law suits either win or lose them in whole or in part and it is difficult to conceive of a lawsuit in which a party or the stockholder of a corporate party does not have a material, pecuniary interest in the way in which the lawsuit is decided."

Then on September 19, that same Assistant Attorney General writes:

> Nor would it appear that the outcome of the case involving competitive liens on used bowling alley equipment could conceivably have affected the market value of Brunswick.

I submit, Mr. Chairman, that these are conflicting viewpoints which cannot be squared one with the other. Contrast also the statement of Senator Griffin, when he wrote in the June 1969 Ripon Forum that "The Senate in considering a Supreme Court nominee has the solemn obligation"—I am quoting now—"which includes ascertaining whether a nominee has a sufficient sense of restraint and propriety."

And later he says:

"The courts must not be scarred even by suspicions concerning the financial or political dealings of their members."

I have been told by friends of mine who have studied these cases, the Fortas case and the Haynsworth case, that Haynsworth's conduct makes Fortas look like an altar boy. Since I am obviously not qualified to describe altar boys I cannot judge whether that is an accurate description or not, but I do say to you, Mr. Chairman, that what this committee has before it is not merely the historic test of advising and consenting with respect to a Presidential nominee to be an Associate Justice of the Supreme Court, but it has the challenge of a crisis of confidence in this country. People want to know, Is the test the same? Will the standards be the same? Will the same Senators and commentators who demand the purity of one judge demand it also of another? And we associate ourselves with that view, Mr. Chairman.

We are distressed that at this very critical period in American history when every effort must be made to achieve a measure of unity and to strengthen the essential social fabric of our——

The CHAIRMAN. Are you on your prepared statement now?

Mr. SCHLOSSBERG. Yes, sir.

The CHAIRMAN. What page?

Mr. SCHLOSSBERG. I am in the middle of the second paragraph, Mr. Chairman.

The CHAIRMAN. I see.

Mr. SCHLOSSBERG (continuing). Strengthen the essential social fabric of our Nation President Nixon has nominated for the Supreme Court, that citadel of hope for the oppressed, a man whose record is incompatible with the spirit of reconciliation and understanding.

We oppose Judge Haynsworth's appointment and urge the Senate to reject it because we believe he has shown that he lacks the essential depth, social sensitivity, and philosophical insight considered to be the prime qualifications for membership on our Nation's highest court.

More specifically, we are disturbed by Judge Haynsworth's seeming lack of moral sensitivity and candor concerning his conflict of interest and his antiunionism, consistently reflected in his decisions. His decisions, his investments, his judicial conduct, and his lifetime close association with socially backward, irresponsible, and reactionary economic interests in the South raise very serious doubts concerning his ability to administer justice objectively and impartially. These are the matters we will discuss, and we will leave it to the Leadership Conference on Civil Rights to analyze the Haynsworth record on civil rights for the committee. We are convinced, however, that Haynsworth is essentially anticivil rights and that his decisions support segregation. The UAW finds it unthinkable that such a man should be appointed to the Supreme Court in 1969 and we oppose him for that reason also.

In view of Mr. Nixon's narrow mandate and his subsequent promise to bring us together, his decision to elevate so controversial and partisan a jurist as Judge Haynsworth to the Nation's highest court is most unfortunate and contrary to the President's objective of strengthening our Nation's unity.

I start now with the ethical considerations. (Reading prepared statement.)

I. The Haynsworth participation in the Darlington (Deering, Milliken) cases, we think, shows him unfit for the Supreme Court.

He did represent Judson, a division of Deering, Milliken, he represented them after they became Deering, Milliken, and indeed his former law firm which still goes by the name of Haynsworth, Perry, Bryant, Marion and Johnstone, still represents Judson Mills, a Deering, Milliken division.

A. Deering, Milliken & Co., a former client.

When Judge Haynsworth was appointed to the Bench, his law firm represented Judson Mills, a division of Deering, Milliken & Co.,[1] as is Darlington Manufacturing Company, so that when he sat on a case involving Deering, Milliken, he was hearing a matter involving a former client. This was an unfortunate tie between Haynsworth and Deering, Milliken. Alone it would not have been significant enough for the Judge to disqualify himself. But the fact was not alone.

B. Haynsworth's lifetime representation of large, antiunion Southern textile interests.

J. W. McKinney, Associate Editor of the Greenville (South Carolina) News is quoted as saying:

"We went through an Industrial Revolution here after World War II. Clement (Haynsworth) did a lot of legal work behind the scenes that brought the large textile firms in from the North."

[1] According to the law directory of Martindale Hubbell, the firm of Haynsworth, Perry, Bryant, Marion & Johnstone still represents Judson Mills.

We are entirely convinced of the accuracy of Mr. McKinney's remarks. Indeed, Judge Haynsworth, as a lawyer, might have been called Mr. Southern Textile. To read the roster of representative clients of Haynsworth, Perry, Bryant, Marion & Johnstone even today is instructive. One finds, in addition to the Deering, Milliken firm, Judson. the following: J. P. Stevens & Co. (certainly no stranger to the NLRB and the courts), Bigelow Sanford, Inc., Wellman Combing Co., Burlington Industries, Inc., Abney Mills, and Fiber Industries, Inc., also Cohen Mills.

Both in 1957 and today those representative clients sound like a roster of the nonunion textile industry of the South.

Judge Haynsworth's active practice over the years included long and valuable service to the Southern textile industry—one of the last overwhelming antiunion industries in America. It is, of course, perfectly proper for Judge Haynsworth, as a lawyer. to have given legal representation to that industry over the years. Nevertheless, well remunderated years of devoted service to an industry of this kind and close association with its leaders are bound to affect the values of a judge sitting as pivotal swing man in a major test case involving the discharge of 500 employees and the right of a textile employer to close a part of his operation, to discourage union organization. Just as his lifetime association with the Southern antiunion textile interests does not make him the ideal swing judge in Darlington, the industry's most important labor case, it does not qualify him to sit on the Supreme Court.

Mr. Chairman, I happen to have been a member of a law firm here in Washington in 1957, and I remember our firm engaged Arthur J. Goldberg, then a private lawyer, to act as an umpire in a case between the American Federation of Musicians and its local 47 in Hollywood, and he sat as a mere umpire. I think his partner said this morning that all his fee was paid by the international union. That may be correct. My recollection was that part of his fees was paid by the local union, and in that he decided an internecine union dispute. That was his total connection with the Musicians' Union in 1957. Yet when he became Mr. Justice Goldberg in 1964, in the *Whitstein* case involving the Musicians' Union he felt because of that very tangential umpire relationship in 1957 he had better not sit. That we suggest teaches us something.

We believe it would have been appropriate for a judge whose entire professional life had been intimately connected with the Southern textile industry to have avoided deciding its most important case—especially where the litigant was a former client.

Lord Justice Scrutton, in the Cambridge Law Journal, 1921, said it well. He wrote:

> I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labor, Labor says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labor man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.

Departing for a moment from my text I want to make this point because I feel it is a crucial point. I do not think that representation of the textile industry, even the southern textile industry over these years, necessarily could disqualify this man, but he had every obligation to cut his ties and to show, to give us a tender of good faith when he took the Federal Bench.

He is not on the Supreme Court but he is on the next court to the Supreme Court. He had an obligation to leave that closed corporation and an obligation, it seems to me, to sell some of that heavy textile stock.

When you decide the Darlington Mills case favorably to Darlington Mills you are helping J. P. Stevens, and don't tell me that Judge Haynsworth is not sophisticated enough to know that. Let us talk a minute about J. P. Stevens.

The judge has told us that he did not sell the stock in J. P. Stevens because he felt such a close relationship with that company, it being his main client, that he would not have sat on thoses cases anyway.

I suggest that a company like J. P. Stevens, which is the classic violator, the classic violator of Federal labor law, which has in effect said that it does not believe in the existence of any rights under Wedner or Taft-Hartley, and has told the Congress by its behavior, it has said it does not recognize the Federal labor law. It is a scofflaw. That company was with his main client in private relationship.

To compare that kind of stock, a holding of $20,000 worth of J. P. Stevens stock, to Chrysler stock is quite an odd comparison. I point out, moreover, that this vending machine company stock that he held, and the J. P. Stevens stock, were both corporations which did business almost exclusively in his circuit, so if they were to come before the courts, they would come before the Fourth circuit.

C. The Vending Machine Corporation:

It is now clear that Judge Haynesworth owned about 15 percent of the stock of a vending machine company he helped to form in 1950.

I cannot resist adding that he would understand why he would want to keep it a secret, even though it was not a very well-kept secret, because I have never before heard of a judge in the vending machine business. I have heard of many people, and the city I now live in is Detroit and there are many people in vending machines but I doubt if a single judge in the whole State of Michigan is in the vending machine business. But anyway he says it was a secret. We will talk about that later.

At any rate, it was a very speculative investment. From a few thousand dollars in 1950, and paying him directors' fees over the years, that stock rose to a value of something in the neighborhood of $450,000. It might be suggested that rather than waste his time on the Federal Bench, Judge Haynsworth might want to write a primer on investments.

While the *Deering, Milliken* case was before his court, Judge Haynsworth resigned as a director of the Carolina Vend-A-Matic Co., but he did not dispose of his one-seventh interest until after the decision.

There has been some confusion about whether the union knew about the interest. I understand the Textile Council will testify before the

committee and I am told they will make clear they did not know that and I think that is another thing which bears on this whole question of credibility in the Haynsworth matter.

Carolina Vend-A-Matic increased its business exactly twice during the time between the argument and the decision in the *Deering Milliken* case. I do not say, Mr. Chairman, and members of the committee, that this was a calculated thing, but I say it violates Canon 4, the mere appearance of impropriety.

And I go back again to the July editorial in the American Bar Association Journal when they are talking about the Fortas case, and they say in that editorial, and they are discussing an earlier editorial:

"But in our editorial we suggested that he"—meaning Judge Fortas—"was not as frank as he should have been in that he failed to explain the payment to him of a substantial fee contributed by former clients and possible litigants before the Court for a university lecture service."

Now I suggest to you that if the American Bar Association finds a lack of candor in Justice Fortas in not coming before the Judiciary Committee or the American Bar Association, or some other wing of the establishment, and saying to it, "I have been invited to lecture in a university, I am to get a large fee, and I am going to tell you who contributed the money for that fee," I suggest to you that that is much more tangential than owning one-seventh of a vending machine company which did a $100,000 a year business with a direct litigant before his court, not a possible litigant or a possible client, and I suggest to you also that the fact, as Senator Bayh brought out here in these committee hearings, that three quarters of the customers of the Vend-A-Matic Co. were textile mills, had some bearing on this judge's values.

We suggest, turning now to the top of page 6 of my prepared statement, that at the very least, it seems that Judge Haynsworth was guilty of very poor judgment and a complete lack of candor; at worst, he was guilty of serious and compromising conflict of interest. Either ground should eliminate him from consideration for elevation to the Supreme Court.

I might say at this point, Mr. Chairman, that I think it ill behooves either Judge Haynsworth or the Justice Department to compare his holdings in that vending machine company, where he held a one-seventh interest, to A.T. & T., to saying a judge could never sit on a case if he had a telephone or if he had one share of telephone stock. This was a closely-held corporation, doing substantial business with litigants before that court, and three-quarters of its customers were textile mills, and this was the textile industry's big case.

The Justice Department, incidentally, on page 10 of its letter to Senator Hruska of September 5, cites the case of *Lampert* v. *Hollis Music, Inc.* They say that that case stands merely for the proposition that a small amount of stock in one of the litigants would not disqualify a judge because it was remote and inconsequential. I quote from that case, if it please the committee, on pages 6 and 7, and I would like to read that quote, because I think it shows what *Lampert* v. *Hollis Music* really stands for, and I think it shows the dereliction of candor by Judge Haynsworth.

Quoting from *Lampert* v. *Hollis Music*, 105 F. Supp. 3:

> I have ascertained that the Radio Corporation of America has issued 13,881,016 shares of no par common stock. My interest, therefore, would be represented by the fraction of 20/13,881,016. I do not see how, by any process of reasoning, that could be regarded as a "substantial interest," in the controversy which would justify me in avoiding responsibility by disqualifying myself under the statute.
>
> To guard against error in holding this view, I notified both attorneys in writing, of the stockholding in question and have been assured by a letter from the plaintiff's attorney that he and his adversary have agreed to request that I decide the motion, and this has been construed as a waiver of any possible statutory objection.

I submit that *Lampert* v. *Hollis Music* is a case that stands for candor and the right of the parties to waive, because that is what happened in that case. Compare that, if you will, with Brunswick, where the written opinion had not even been circulated among the judges when the stock was bought, even though the case had been argued, and we are told that a substantive decision had been reached, but the opinion had not been written when he bought the stock. He knew of the stock. He told this committee, as I read the transcript, that he knew of the stock, and he was aware of it when he saw the memorandum opinion circulated by another judge in his court, and yet he sat on substantive motions, a motion for rehearing.

What could be more substantive than that? A motion for a new trial, a motion for an extension of time?

What I say to this committee is that when that judge participated in that case, with full knowledge that his broker had bought stock, 18 or $16,000 worth of stock, directly from one of the litigants in that case, you cannot pass it off as used bowling alley equipment. This is a matter of principle, if it please the committee, when that judge did not call those lawyers in and tell them, "I have this stock, it does not influence me in one way or the other and I want a waiver from you in writing," that judge was guilty of a further dereliction of duty.

His first mistake was in buying the stock, his second mistake is in not revealing it until he got here and he admitted that he was aware of it.

Now we have a right to demand that kind of candor from the men who are going to sit on the Supreme Court of the United States, and eventually judge lawyers and other judges, and the great issues of our time. We have a right to demand that kind of candor also from the Justice Department, who has become an apologist here.

Turning now to some of the fourth circuit labor decisions Judge Haynsworth wrote or concurred in, and which, to our mind, indicate a pronounced anti-union, anti-worker, pro-employer bias. This bias is shown to us by three categories of cases—cases involving authorization cards, plant closedown, and employees' right to strike.

I will not dwell on the authorization cards cases except to say that Judge Haynsworth's characterization of cards, authorization cards, as a method of achieving bargaining status, as we quote on page 9 of the prepared statement, that they are inherently not a reliable indicator of the employees' wishes, is out of step with every circuit court in the United States and every justice on the Supreme Court including every conservative justice. I do not fault him because he is out of step and entitled to do wrong, that is one thing, but this is of great importance.

because the *Logan* case, this whole card case, is important to the industry from which he springs, to the textile industry.

Going now to the bottom of page 10 of my statement, the unanimous decision of the Supreme Court utterly rejecting the Haynsworth view of union authorization cards was crucial to union organizing, particularly in the South. Unfortunately, as Judge Haynsworth apparently cannot appreciate, a few cynical employers, most notably southern textile manufacturers, and I do not mind naming them, one of course is J. P. Stevens, pay no attention to the will of Congress as expressed in Federal labor law.

They hope that if they commit massive and repeated unfair labor practices they can avoid collective bargaining entirely by making it impossible for a union ever to win an election. Only NLRB bargaining order based on cards can prevent these scofflaws from achieving their illegal and antisocial objective.

I think the *Deering, Milliken* case has been adequately discussed and will be discussed because the Textile Workers' Union is going to testify, and I will skip now, if the committee please, to page 13 of my statement and talk about the *Washington Aluminum Co.* case.

EMPLOYEES' RIGHT TO STRIKE

On a very cold day in midwinter, an employer's heating system malfunctioned. Seven employees, upset at the extremely cold conditions in the plant, decided to cease work until the unhealthy situation was corrected. They concertedly left their work stations. The employees were not represented by any union. There was no union in the picture at all. These workers simply did not like working in such miserably cold conditions. The employer fired them for engaging in these activities. Although the Labor Board found that the employer violated the act by discharging these employees, the fourth circuit denied enforcement to its order. *NLRB* v. *Washington Aluminum Co.*, 291 F. 2d 869 (1961). Judge Haynsworth cast the deciding vote (Sobeloff dissented) in siding with the employer and holding that the right to strike set forth in the act does not permit employees to get together and protest working conditions unless they first seek employer permission to do so.

The thrust of the fourth circuit decision is that no strike can ever be called unless the employer accedes to it, for otherwise, as in *Washington Aluminum*, the employee strike might disrupt "regular production schedules involving 'critical' purchase orders." Id. 291 F.2d at 877–878, Judges Haynsworth and Boreman seemingly expected unrepresented workers to behave as sophisticated management officials wish them to, thereby placing undue restrictions on their right to engage in concerted activities.

Happily, the Haynsworth-Boreman view was unanimously reversed by the Supreme Court which held that the right to strike for improved or changed working conditions was manifest and was not subject to crippling restrictions, 370 U.S. 9 (1962).

The President has nominated Judge Haynsworth to fill the seat vacated by a justice accused of errors in personal judgment and possible injudicious conduct. Some segments of the press, the administration and even some Senators freely made strong comments with respect to

the conduct of judges. We believe the American people are vitally interested in how those same commentators will view the qualifications of Judge Haynsworth with respect to his conduct and judgment.

The UAW would view his confirmation as a tragic event.

(Mr. Schlossberg's prepared statement follows:)

STATEMENT OF INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA–UAW

The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) urges this Committee and, through it, the Senate of the United States, to deny confirmation to Judge Haynsworth.

We are distressed that at this very critical period in American history when every effort must be made to achieve a greater measure of unity and to strengthen the essential social fabric of our nation President Nixon has nominated for the Supreme Court, that citadel of hope for the oppressed, a man whose record is incompatible with the spirit of reconciliation and understanding.

We oppose Judge Haynsworth's appointment and urge the Senate to reject it because we believe he has shown that he lacks the essential depth, social sensitivity and philosophical insight considered to be the prime qualifications for membership on our nation's highest court.

More specifically, we are disturbed by Judge Haynsworth's seeming lack of moral sensitivity and candor concerning his conflict of interest and his anti-unionism, consistently reflected in his decisions. His decisions, his investments, his judicial conduct and his lifetime close association with socially backward, irresponsible and reactionary economic interests in the South raise very serious doubts concerning his capability to administer justice objectively and impartially. These are the matters we will discuss, and we will leave it to the Leadership Conference on Civil Rights to analyze the Haynsworth record on civil rights for the Committee. We are convinced, however, that Haynsworth is essentially anti-civil rights and that his decisions support segregation. The UAW finds it unthinkable that such a man should be appointed to the Supreme Court in 1969 and we oppose him for that reason also.

In view of Mr. Nixon's narrow mandate and his subsequent promise "to bring us together," his decision to elevate so controversial and partisan a jurist as Judge Haynsworth to the nation's highest court is most unfortunate and contrary to the President's objective of strengthening our nation's unity.

I.

The Haynsworth participation in the Darlington (Deering, Millikin) cases shows him unfit for the Supreme Court.

A. *Deering, Milliken & Co., a former client.*

When Judge Haynsworth was appointed to the bench, his law firm represented Judson Mills, a division of Deering, Milliken & Co.,[1] as is Darlington Mfg. Co., so that when he sat on a case involving Deering, Milliken, he was hearing a matter involving a former client. This was an unfortunate tie between Haynsworth and Deering, Milliken. Alone it would not have been significant enough for the Judge to disqualify himself. But the fact was not alone.

B. *Haynsworth's lifetime representation of large, anti-union Southern textile interests.*

J. W. McKinney, Associate Editor of the Greenville (South Carolina) News is quoted as saying:

"We went through an Industrial Revolution here after World War II Clement [Haynsworth] did a lot of legal work behind the scenes that brought the large textile firms in from the North."

We are entirely convinced of the accuracy of Mr. McKinney's remarks. Indeed, Judge Haynsworth, as a lawyer, might have been called "Mr. Southern Textile." To read the roster of representative clients of Haynsworth, Perry, Bryant, Marion and Johnstone even today is instructive. One finds, in addition to the Deering Milliken firm, Judson, the following: J. P. Stevens and Company (certainly no stranger to the NLRB and the Courts), Bigelow Sanford, Inc., Wellman Combing Co., Burlington Industries, Inc., Ahney Mills and Fiber Industries, Inc.

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[1] According to the law directory of Martindale Hubbell, the firm of Haynsworth, Perry, Bryant, Marion & Johnstone still represents Judson Mills.

Judge Haynsworth's active practice over the years included long and valuable service to the Southern textile industry—one of the last overwhelmingly anti-union industries in America. It is, of course, perfectly proper for Judge Haynsworth, as a lawyer, to have given legal representation to that industry over the years. Nevertheless, well remunerated years of devoted service to an industry and close association with its leaders are bound to affect the values of a judge sitting as pivotal swing man in a major test case involving the discharge of 500 employees and the right of a textile employer to close to discourage union organization. Just as his lifetime association with the Southern anti-union textile interests does not make him the ideal swing judge in *Darlington*, the industry's most important labor case, it does not qualify him to sit on the Supreme Court.

Patently, it would have been appropriate for a judge whose entire professional life had been intimately connected with the Southern textile industry to have avoided deciding its most important case—especially where the litigant was a former client.

Lord Justice Scrutton, in the Cambridge Law Journal, 1921, said it well. He wrote:

"I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour, Labour says: 'Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?' It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class."

C. *The Vending Machine Corporation*

It is now clear that Judge Haynsworth owned about 15% of the stock of a vending machine company he helped to form in 1950. The value of that stock rose from a few thousand dollars in 1950 to about $450,000, when he sold his stock several months after the Deering, Milliken ruling in 1963. *While* the Deering, Milliken case was before his court, Judge Haynsworth resigned as a director of the Carolina Vend-a-Matic Company, but he did not dispose of his 1/7 interest until *after* the decision. Carolina-Vend-A-Matic was doing about $50,000 a year business with Deering, Milliken & Co. when the case came before Judge Haynsworth's court and its business with Deering, Milliken was doubled between the argument and decision in the Deering, Milliken case. Neither the union in the case nor the NLRB was informed of any of this by Judge Haynsworth, who cast the deciding vote in the case.

We believe that 28 U.S.C. § 455 required Judge Haynsworth to disqualify himself. That Section of the Code reads as follows:

"*Interest of justice or judge.*—Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to set on the trial, appeal, or other proceeding therein."

At the very least, it seems that Judge Haynsworth was guilty of very poor judgment and a complete lack of candor; at worst, he was guilty of serious and compromising conflict of interest. Either ground should eliminate him from consideration for elevation to the Supreme Court.

Indeed, one might question the propriety of a judge's mere holding for ten years so speculative an investment as the one-seventh interest in the vending machine company in view of Canon 26 of the Code of Judicial Ethics of the American Bar Association. Canon 26 clearly suggests that a judge's personal investments be confined to enterprises not apt to involve litigants and to those of a non-speculative nature.[2]

The Comittee should compare Judge Haynsworth's conduct in this case where he held a one-seventh interest in a corporation doing substantial business with one of the litigants to that of a federal judge in the Eastern District of New York. *Lampert* v. *Hollis Music*, 105 F. Supp. 3. There, the judge who held an insignificant interest in a corporation, stated (at 105–6):

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[2] Drinker, *Legal Ethics*, 278 (Columbia, 1953).

"I have ascertained that the Radio Corporation of America has issued 13,881,016 shares of no par common stock. My interest, therefore, would be represented by the fraction of 20/–13,881,016. I do not see how, by any process of reasoning, that could be regarded as a 'substantial interest,' in the controversy which would justify me in avoiding responsibility by disqualifying myself under the statute.

"To guard against error in holding this view, I notified both attorneys in writing, of the stockholding in question and have been assured by a letter from the plaintiff's attorney that he and his adversary have agreed to request that I decide the motion, and this has been construed as a waiver of any possible statutory objection."

Should not Haynsworth have done at least that much?

D. *The Lack of Candor as to his "Clearance"*

Finally, we are bothered by the Administration's attempt to make it appear that Judge Haynsworth was "cleared" of all conflict of interest charges by his own court and the Justice Department. He was cleared only of a charge of having been "paid-off" or rewarded for his *Darlington* decision. There has been no pronouncement on the basic propriety of his conduct. He has *not* been "cleared" by any official body or agency of a basic conflict of interest. Indeed, the facts would make such blanket clearance most unlikely.

II

We turn now to some of the Fourth Circuit labor decisions Judge Haynsworth wrote or concurred in, and which, to our mind, indicate a pronounced anti-union, anti-worker, pro-employer bias. This bias is shown by three categories of cases—cases involving authorization cards, plant closedown, and employees' right to strike.

A. *Authorization Cards*

In *NLRB* v. *S. S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir., 1967), Judge Haynsworth wrote an opinion which created great furor in the field of labor law. At issue was the question of the Labor Board's power to order an employer to recognize and bargain with a union which holds signed authorization cards from a majority of unit employees and the employer has committed unfair labor practices which made the holding of a fair election impossible or highly improbable. The Board, along with virtually every court of appeals has long held that it has such power (*NLRB* v. *Gissel Packing*, —— U.S. —— (1969), 71 LRRM 2481, 2486 n. 6, citing cases from virtually every circuit). However, in *Logan*, Judge Haynsworth *categorically* rejected the use of authorization cards as a means of demonstrating a union's majority status even in cases where the employer has committed unfair labor practices which are designed to preclude the holding of a fair election. As stated by Haynsworth:

"It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' . . . No thoughtful person has attributed reliability to such card checks." (386 F. 2d at 565).

No thoughtful person, that is, except for the unanimous Labor Board, every single reviewing court of appeals (including the Fourth Circuit, see *NLRB* v. *Lifetime Door*, 390 F. 2d 272 (4th Cir., 1968), the Supreme Court and the many many employers who have agreed to such card checks and have abided by them.

Judge Haynsworth went on, however, and ruled that authorization cards are "inherently . . . not a reliable indication of the employees' wishes," adding that:

"An employer could not help but doubt the results of a card check as an indication of the wishes of employees, for there is nothing in the process to allay it. Unless the employer is extraordinarily gullible and unimaginative, he will at least suspect unreliability in the cards . . ." *Id.*, at 566.

Thus, it follows that virtually the entire bench of the courts of appeals is staffed with "gullible and unimaginative" judges. Or perhaps, one judge's prejudices are showing through a hole in his judicial robes.

After *Logan* was expressly rejected in at least five circuits (*NLRB* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 836 (2nd Cir., 1968), *NLRB* v. *Goodyear Tire & Rubber Co.*, 394 F. 2d 711, 712–713 (5th Cir., 1968); *NLRB* v. *Atco-Surgical Corp.*, 394 F. 2d 659, 660 (6th Cir., 1968), *NLRB v. Ozark Motor Lines*, 403 F. 2d 356 (8th Cir., 1969); and *NLRB* v. *Sinclair Co.*, 397 F. 2d 157 (1st Cir., 1968), aff'd ——— U.S. ——— 71 LRRM 2481), the Supreme Court considered the issue

at length and categorically rejected Haynsworth's reasoning, thus keeping intact his perfect record of being reversed by the high court in labor areas. In *Gissel, supra*, the Court had before it three more fourth circuit cases which had adopted Chief Justice Haynsworth's *Logan* approach. *NLRB* v. *Gissel Packing*, 398 F. 2d 336; *NLRB* v. *Heck's, Inc.*, 398 F. 2d 337; *General Steel* v. *NLRB*, 398 F. 2d 339, along with *Sinclair, supra*, (which had gone the other way). Haynsworth had participated in all three fourth circuit decisions. In a *unanimous* decision, the Supreme Court pointed out its long-time adherence to the view that authorization cards can be—and indeed sometimes must be—used to demonstrate majority status. 71 LRRM at 2488–2489, citing its post-Taft-Hartley *United Mine Workers* v. *Arkansas Oak Flooring* decision 351 U.S. 62 (1956). The Court then added:

"The acknowledged superiority of the election process [as acknowledged by the Board], however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employees choice." *Id.* at 2491.

The Court went on to reject Haynsworth's contrary argument and reaffirmed its belief that the Board had the power to issue bargaining orders without requesting the union to maintain its majority status, *id.*, 71 LRRM at 2494.

The unanimous decision of the Supreme Court utterly rejecting the Haynsworth view of union authorization cards was crucial to union organizing, particularly in the South. Unfortunately, as Judge Haynsworth apparently cannot appreciate, a few cynical employers, most notably Southern textile manufacturers, pay no attention to the will of Congress as expressed in federal labor law. They hope that if they commit massive and repeated unfair labor practices they can avoid collective bargaining entirely by making it impossible for a union ever to win an election. Only NLRB bargaining orders based on cards can prevent these scofflaws from achieving their illegal and anti-social objective.

B. *Plant Closedown*

In 1956, in order to categorically punish its employees for daring to vote in favor of representation by a union, Darlington Mfg. Co., of Deering Milliken & Co., suddenly closed its plant, discharging over 500 employees in the process. Such massive retaliation was taken in order to "chill unionism" at other Deering Milliken plants and was therefore in violation of the Taft-Hartley Act. This case went to the Fourth Circuit three times and each time Haynsworth participated in the decision despite, as indicated above, his personal ties with Deering, Milliken and the textile industry. *Deering Milliken v. Johnson*, 295 F.2d 856 (1961) [Haynsworth wrote decision in favor of employer on procedural issue] *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (1963). [Haynsworth cast deciding vote giving employer absolute right to close even part of its business regardless of anti-union motive. The Supreme Court, in unanimous agreement with Judge Bell's ringing dissent, reversed that Haynsworth majority, stating that while an employer has a right to close his *entire* business for anti-union motives, it does not have the right to close *part* of its business to discourage unionization elsewhere. A partial closing is an unfair labor practice;

"if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect." 380 U.S. 263, 275 (1965).

Then, on remand, after the Board ordered the employer to pay back wages which amounts were to be computed in the compliance stages of the proceeding, Judge Haynsworth gratuitously gave another assist to the employer. Despite findings of anti-union animus, made by the Board, the Supreme Court and even the Fourth Circuit, 397 F.2d 760, Haynsworth, in his concurring opinion, ignoring the findings of fact by a 5-man Labor Board, a majority of his own court and a unanimous man Supreme Court, interposes his own belief and indicates *IN ADVANCE of hearings on the matter* that the employer acted in good faith and therefore should not be obligated to pay much back pay to the employees.

The Deering, Milliken case is, of course, the "big" case to date in the effort of the Southern textile industry to avoid collective bargaining. If the Haynsworth view had been accepted and employers could close one facility to chill unionism in another, it might never be possible to organize the textile industry in that section of the country. Moreover, the sucess of that union-busting technique would have spread quickly to other industries. But it is not the anti-union principle alone that was involved in the Deering, Milliken case. It must never be forgotten that 500 workers were discharged because the employer did not like unions. So that decision comes out as anti-worker as well as anti-union.

C. Employees' Right to Strike

On a very cold day in mid-winter, an employer's heating system malfunctioned. Seven employees, upset at the extremely cold conditions in the plant, decided to cease work until the unhealthy situation was corrected. They concertedly left their work stations. The employees were not represented by any union. There was no union in the picture at all. These workers simply did not like working in such miserably cold conditions. The employer fired them for engaging in these activities. Although the Labor Board found that the employer violated the Act by discharging these employees, the Fourth Circuit denied enforcement to its order. *NLRB v. Washington Aluminum Co.*, 291 F. 2d 869 (1961). Judge Haynsworth cast the deciding vote (Sobeloff dissented) in siding with the employer and holding that the right to strike set forth in the Act does not permit employees to get together and protest working conditions *unless they first seek employer permission to do so.*

The thrust of the Fourth Circuit decision is that no strike can ever be called unless the employer accedes to it, for otherwise, as in *Washington Aluminum*, the employee strike might disrupt "regular production schedules involving 'critical' purchase orders." *Id* 291 F. 2d at 877–878. Judges Haynsworth and Boreman seemingly expected unrepresented workers to behave as sophisticated management officials wish them to, thereby placing undue restrictions on their right to engage in concerted activities.

Happily, the Haynsworth-Boreman view was unanimously reversed by the Supreme Court which held that the right to strike for improved or changed working conditions was manifest and was not subject to crippling restrictions, 370 U.S. 9 (1962).

CONCLUSION

The President has nominated Judge Haynsworth to fill the seat vacated by a justice accused of errors in personal judgment and possible injudicious conduct. Some segments of the press, the administration and even some Senators freely made strong comments with respect to the conduct of judges. We believe the American people are vitally interested in how these same commentators will view the qualifications of Judge Haynsworth with respect to his conduct and judgment.

The UAW would view his confirmation as a tragic event.

Senator HART. Mr. Schlossberg, with respect to the last case you cited, the *Washington Aluminum* case, can you tell us whether the decision there at the circuit level which involved Judge Haynsworth was inconsistent with any other Federal case, or had this decision not been reached until this particular circuit faced the question, and then subsequently the Supreme Court?

Mr. SCHLOSSBERG. It is my recollection that there were many decisions involving the right of employees to engage in this kind of concerted activity. It was not a new proposition at all.

Senator HART. Certainly that was true in the *Logan* case?

Mr. SCHLOSSBERG. Yes, sir.

Senator HART. Perhaps Senator Hruska, who has had an opportunity to hear the testimony, will ask some questions while Senator Ervin brings himself up to date.

Senator HRUSKA. Mr. Witness, in your statement you describe the professional interest that Judge Haynsworth had in the legal affairs of textile mills, and one of your subtitles there is that "Haynsworth's lifetime representation of large antiunion Southern textile interests."

On page 4 of your statement, skipping that portion in which you detailed some of the representations and experiences, you then testified:

Patently it would have been appropriate for a judge whose entire professional life has been intimately connected with the Southern textile industry to have avoided its most important case, especially where the litigant was a former client.

I take it that you criticize any judge who had a former client in the private law practice from sitting in judgment on a case that is later brought by this ex client before his court; is that your point?

Mr. SCHLOSSBERG. No, sir, Senator. I think the peculiar circumstances of this case are different than the general proposition that you have propounded to me. For instance, I am told, I do not know this for a fact, that the Supreme Court has a 5-year rule, that a normal client-lawyer relationship is considered to be eroded after 5 years, and that this rule, however, is viewed in the light of special circumstances.

If you had a special relationship with a client, you might never wish to sit on a case involving that particular client. And indeed I think the record is clear here and history is clear, Senator, that Arthur J. Goldberg did not sit on any case in which the union had been a client or he had been employed by the union as far back as 8 or 10 years.

Certainly in my own recollection in the *Wittstein* case, as I told you today, it was 7 years from the time that he was retained as an umpire, he did not choose to sit.

Senator HRUSKA. Arthur J. Goldberg was general counsel, was he not, for the Steel Workers' Union?

Mr. SCHLOSSBERG. Yes, sir.

Senator HRUSKA. And then he was special counsel from time to time and on a rather sustained basis for AFL–CIO; was he not?

Mr. SCHLOSSBERG. That is correct.

Senator HRUSKA. But you would not condemn a man who spends his lifetime as a practitioner in a special field from ascending to the Court, whether it be district or circuit or Supreme Court, and sitting in judgment on cases evolving from that same special area of law; would you?

Mr. SCHLOSSBERG. Senator, let me make myself clear. Let me give you an example. I think I am obviously not coming through to you.

Senator HRUSKA. Apparently not.

Mr. SCHLOSSBERG. Let me try. I happen to know a gentleman named William Gossett who was president of the American Bar Association last year. Before that, some time before, he was general counsel for the Ford Motor Co. He had been general counsel of the Bendix Corp. He has been a large, powerful corporation lawyer all his life, serving those interests. He would make a marvelous Supreme Court judge and I would be one of the first to testify for him, because he has been able to and he has demonstrated that without ever sitting on the Federal bench, he has demonstrated that merely by 1 year as president of the American Bar Association—he has been able to cut his ties with any industry that he has served in the past, and to demonstrate that he has the necessary judicial temperament to serve in high judicial office. Judge Haynsworth has not demonstrated that.

I do not think you can take the Haynsworth case, where a man holds J. P. Stevens stock, wears a J. P. Stevens' badge, so to speak, and who has represented these interests all his life, and sits on their most important labor case, that you can take that man and make a general rule out of him. I do not think you can take a general rule out of him unless you add all the plusses together, the plusses that say this man is unfit, unless you look at his vending machine operation and who the customers were, unless you look at how he told this committee nobody knew, and later we find out that Wade Dennis, that the first

thing he told the Dun & Bradstreet people, the critical people, that Haynsworth was first vice president.

We have heard from this judge while he sat on the bench that he went to weekly board of directors' meetings. Now I have known some corporations in my life. I do not know any corporations that meet weekly, but I have learned a lot of things in this case, Senator. I have never known a judge in the vending machine business before.

Senator HRUSKA. What is this weekly board meeting?

Mr. SCHLOSSBERG. He said that they had weekly board meetings at lunch, and that he attended many more after he came to the bench than before he was on the bench. I am talking about the vending machine company. Indeed he told us that during the year 1963, which was not a full year with the vending machine company, he drew $2,600 in directors' fees. That is insubstantial to a millionaire southern judge like Judge Haynsworth, but very substantial to me, a union lawyer; $2,600, from those casual board of directors' meetings.

Are we to believe that the salesmen who went to these various textile industries and tried to place these vending machines in their places did not say to these textile industries, "This is Judge Haynsworth's company"?

I can hear it right now just like the cowboy on television says when he rides over the horizon, "This is Marlboro country."

Senator HRUSKA. If he had that much influence and prestige, and if he was possessed of the near omnipotence that you assign to him, why didn't they get more business with the plants of the Deering-Milliken Co.?

Mr. SCHLOSSBERG. I do not know.

Senator HRUSKA. They had them in only three plants out of——

Mr. SCHLOSSBERG. Maybe those were the only connections that Denis and Haynsworth had, you know. I just do not know.

Senator HRUSKA. They served only three plants in the mills of the Deering, Milliken——

Mr. SCHLOSSBERG. Three or four.

Senator HRUSKA. There were three companies in one of those mills, but it was one building as I understand it.

Mr. SCHLOSSBERG. Right.

Senator HRUSKA. And then there were two others. Now, if he had the position of dominance that you describe, why didn't he get more than $100,000 worth of gross sales in those companies?

Mr. SCHLOSSBERG. Senator, it is hard for me to speculate, and this is a terrible thing to say and I do not make it as a charge, but if I have to speculate I am going to speculate. Maybe Deering, Milliken decided that there comes a point when you draw the line, and that $100,000 is all we can afford to give this guy while he is a sitting judge hearing our cases. Now, I am speculating, Senator.

Senator HRUSKA. You take it that Deering, Milliken gave him $100,000?

Mr. SCHLOSSBERG. I did not say that.

Senator HRUSKA. You just said so.

Mr. SCHLOSSBERG. No, I did not, Senator.

Senator HRUSKA. Do you change that language?

Mr. SCHLOSSBERG. I said maybe they said, "This is all the business

we can give this guy's company while he is a sitting judge." I did not want to speculate, but you forced me into it.

Senator HRUSKA. I did not force you into it, and if you were here sitting at these hearings and considered the record, which is sworn testimony——

Mr. SCHLOSSBERG. Right.

Senator HRUSKA. And if you had had any desire to inform yourself you would not have to speculate, and when facts are available under sworn testimony, speculation is out of order in my judgment. The record will show that whatever contracts they got were acquired by reason of competition bids; and in three instances, the last three times, they were not the prevailing party. I just cannot quite square that result with an officer who has such an omnipotence that he can say anything and he gets paid off. Isn't that what you are saying?

Mr. SCHLOSSBERG. You do not understand. I am going to try once more to make myself clear and then I am really at a loss about how to do it. No. 1, I do not make the charge that Deering-Milliken paid off Judge Haynsworth.

Senator HRUSKA. That is good.

Mr. SCHLOSSBERG. I do not make that charge.

Senator HRUSKA. That is good.

Mr. SCHLOSSBERG. I do not make the charge that Judge Haynsworth consciously attempted to influence Deering-Milliken with his decision in the *Darlington* case.

Senator HRUSKA. That is good.

Mr. SCHLOSSBERG. I do not make that charge. The charge I make, Senator, and I make it again for about the fifth time, is that he was guilty of serious impropriety; that he misstated, perhaps inadvertently, to this committee, the secrecy of the vending machine business; it was not such a big secret when Wade Dennis was telling people, bragging, that Judge Haynsworth was the first vice president, that Deering-Milliken could have known of it, and that it was improper for him to sit because theres was an appearance under canon 4 of impropriety.

Now, I do not say there was any payoff and I want to make that absolutely clear.

Senator HRUSKA. He was, as you say, on the vending machine company board of directors?

Mr. SCHLOSSBERG. Yes, sir.

Senator HRUSKA. Do you know when he resigned?

Mr. SCHLOSSBERG. I heard here that he resigned in, I believe, October of 1963.

Senator HRUSKA. And that was following the new rules promulgated by the Judicial Conference that thenceforward it would be improper for any judge to sit on any board of directors?

Mr. SCHLOSSBERG. That is right.

Senator HRUSKA. Wherein lies the impropriety then of Judge Haynsworth having served previously on that board? It was done by the dozens of Federal judges. He then retired and resigned from all the public corporations, all except this one and the real estate one. Where does the impropriety lie?

Mr. SCHLOSSBERG. Senator, I think if you will read Mr. Drinker's book on legal ethics you will see that the mere holding of a specula-

tive investment like this closely held corporation, where you invest, where you invest $2,000 apiece, seven people, $2,800 or $1,800, whatever, some nominal amount for a millionaire like Judge Haynsworth, some nominal amount and then you make bank loans using your own credit on speculation, you are endorsing for this small closely held corporation which grows from 1950 to 1963 from a capitalization of a few nominal thousands of dollars to where a one-seventh interest is worth $450,000, I think you will find from reading Mr. Drinker's book, and in my testimony I cite the page where you will find it, that it is improper for the judge to hold the stock.

Now, it is even more improper, it seems to me, for him while he is sitting on the bench, to participate actively in that business. I just take Senator Griffin's statements at face value, the statements he made at the time the Fortas matter was being aired. I agree that a judge ought to be very careful what he invests in and what remuneration he receives, and I think it was improper. I think it was improper to sit on the board before the Judicial Conference said it was.

In my view, and I may be wrong, Senator, I think it would be a great deal more proper for him to sit on a listed public corporation than it would be on this secret vending machine operation operating in his own circuit.

Senator HRUSKA. Will you cite the authority that would make it improper for him to own any stock? You indicated that.

Mr. SCHLOSSBERG. Yes, I will, Senator; yes, sir, I will. The authority is, as I cite on page 6 of my testimony, in the second paragraph, my authority is canon 26 of the Code of Judicial Ethics of the American Bar Association. I then cite to a secondary source, Drinker, Legal Ethics, Columbia Press, 1953, page 278, where Mr. Drinker points out that a judge's personal investment should be confined to enterprises not apt to involve litigants and—this is conjunctive—and those of a nonspeculative nature.

Senator HRUSKA. Canon 26, of course, does say that a judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court. Was the vending machine company involved in litigation in the court?

Mr. SCHLOSSBERG. Not directly, Senator, not directly, but it was apt to be.

Senator HRUSKA. Sure it was apt to be in that sense. Anybody is apt to be. You are apt to be. I am apt to be, anybody is, any company is apt to be, but the fact is they were not. They were not litigants.

Mr. SCHLOSSBERG. That would bring a different canon in, the one that he violated in the *Brunswick* case, if it had been.

Senator HRUSKA. Let us not skip around here.

Mr. SCHLOSSBERG. I am not skipping around.

Senator HRUSKA. I am trying to get authority for your proposition that the judge was improperly an owner of stock in a corporation.

Mr. SCHLOSSBERG. Senator, Mr. Drinker and I read canon 26 to say that it is improper for a judge to hold speculative stock. I believe the American Bar Association's editorials, and canon 4 especially, I am talking now about canon 4, give added weight to the fact that a judge should not invest in these kinds of corporations, and that he should not engage in activities for them while he sits on the Bench.

Now, it is one thing merely to hold the stock. I think it is worse when he becomes a financial manager for them, when he puts his own name and goes on their notes for them, when he uses his prestige at the bank.

More people know of his involvement in the vending machine corporation.

Senator HRUSKA. You and I and probably most businessmen would agree that the type of speculation in the vending machine company was not the type of speculation which is prohibited and which is frowned upon by the canons of ethics. While a relatively small amount of money was directly invested in that firm, there was the signature by each one of the seven men who had an interest in it involving civil liability and credit liability amounting to the hundreds of thousands.

Mr. SCHLOSSBERG. I understand that, sir.

Senator HRUSKA. And they apparently were able to sell the bank on the idea that they had the assets with which to pay those debts any time they came due.

Mr. SCHLOSSBERG. Senator, I do not question that——

Senator HRUSKA. You and I differ on the question of whether this was a speculative stock within the meaning of the canons of ethics.

Mr. SCHLOSSBERG. I want to make clear there is no doubt in my mind these were substantial men, his law partners and this Mr. Denis that he brought in from Deering-Milliken to manage it. These were substantial men, and Judge Haynsworth——

Senator HRUSKA. There wasn't anybody from Deering-Milliken, except a former employee.

Mr. SCHLOSSBERG. That is right. That is who I mean.

Senator HRUSKA. We were told and the record shows that when you consider the entire industry down there that about 80 percent of the gross income in that country is from the textile industry, just as about 74 percent of the gross income in Nebraska comes from livestock. Now, where you are going to find a man in that country who is not involved either in livestock in my State or in textiles in the textile country, or in the union business when it comes to Mr. Goldberg. If you are going to dip into that field you are going to have to get someone there. Objections to such a man do not require speculation, but a pinpointing of the improper connection between one and the other.

Mr. SCHLOSSBERG. Yes, sir.

Senator HRUSKA. Mr. Witness, we have considered Justice Goldberg. I am going to have inserted in the record some of the colloquy between Justice Goldberg and myself. I listened with great interest and with great fascination to his career as a labor union lawyer, and there have been none better. But when he was appointed Secretary of Labor, he resigned from his practice. He agreed never to go back into practice again. He renounced permanently pension rights he had, and for that I commended him highly, and the transcript will so show.

However, he comes from the same background in the labor union business as Judge Haynsworth comes from in the textile business, and he was——

Mr. SCHLOSSBERG. May I comment on that, Senator?

Senator HRUSKA. Not quite yet until I have finished.

"My obligation," said Justice Goldberg, "if I am confirmed and when I am confirmed, to enforce as the Congress does in its own right and in its own way and as the President does in his own way and in his own right to enforce and apply the Constitution of the United States. That is a different obligation, much more serious obligation than the one a private citizen has when he expresses himself on many problems."

Thereupon he swore under testimony that he would uphold the Constitution. What is the difference between that situation and the situation of Judge Haynsworth, where he has foresworn any lovalties that he at one time owed to the textile industry or any of his former clients, and swore to defend and to support the Constitution of the United States?

Mr. SCHLOSSBERG. Let me try and tell you the difference, Senator. I am going to try very hard.

Senator HRUSKA. You will have to try hard.

Mr. SCHLOSSBERG. I intend to. I may fail but I am certainly going to try.

First of all, Arthur Goldberg by the time he had been appointed to the Supreme Court of the United States had served as a Secretary of Labor, and so you had a record of this man having cut his ties to his lifelong representation, and of showing that he could uphold the principles of government in this country. Now, I do not say that any union lawyer who had not had a spell outside the practice of union law, or any company lawyer should be required to in some way distill himself, that is go through a bath of public service before he is eligible for appointment to the judiciary, even the Supreme Court. And indeed I do not know of any union officials or labor people or civil rights people, I do not think the Leadership Conference on Civil Rights or anybody else, came and said, "Don't appoint this textile lawyer to the fourth circuit." I do not think anybody said that. Nobody that I know of—and maybe I am wrong, but you can surely bring me up to date—opposed the confirmation of Judge Haynsworth as a circuit judge.

But we have seen him perform as a circuit judge. We have seen him retain $20,000 worth of J. P. Stevens stock, the most outrageous labor violator in the country, who now are obligated to pay $1 million in back pay and stand under a contempt proceeding in circuit court of the United States.

Senator HRUSKA. Let me get that reference to the J. P. Stevens stock. Did he have that stock when he sat on judgment in their case?

Mr. SCHLOSSBERG. No, sir.

Senator HRUSKA. What is the record——

Mr. SCHLOSSBERG. He sat on labor cases when—J. P. Stevens, which is the epitome of the labor violator, the labor textile violator—he held their stock. To hold their stock is like wearing underneath his judicial robes a badge, to hold J. P. Stevens stock, a stock that a judge should not hold.

Senator ERVIN. I believe Mr. J. P. Stevens has about as good a character as any man in the United States.

Mr. SCHLOSSBERG. I have great respect for you, Senator, and if you say that I am sure that is true. His labor relations are not so good, however.

Senator ERVIN. I think there is a great deal of emotion in labor matters, and I think that unions feel like anybody that does not agree with them is sort of an evil man.

Mr. SCHLOSSBERG. No.

Senator ERVIN. But Mr. Bob Stevens in my book, and I think in the book of everybody who knows him, is a very high type gentleman even though he may be opposed to unionism.

Mr. SCHLOSSBERG. He certainly is that, Senator.

Senator ERVIN. People are divided into three classes about unionism: Some people oppose voluntary unionism; some people are in favor of compulsory unionism, which is the view of most of the unions in your group probably; and some are for voluntary unionism. I happen to believe in voluntary unionism and I am opposed to compulsory unionism.

Two of those classes, the ones opposed to all unionism and the ones who believe in compulsory unionism are rather violent in their beliefs and they do not have much tolerance for anybody that disagrees with them.

Mr. SCHLOSSBERG. It is a volatile field, Senator.

Senator ERVIN. Yes, sir.

Senator HRUSKA. I understand that there is a lot of criticism of some people because of their antiunionism. In some quarters I understand that there are criticisms against people who are prounionism.

Mr. SCHLOSSBERG. Oh, yes.

Senator HRUSKA. Have you ever heard of those?

Mr. SCHLOSSBERG. Oh, yes.

Senator HRUSKA. That is why we have courts, is it not?

Mr. SCHLOSSBERG. Yes, sir. Let us hope we fill it with men of undisputed integrity.

Senator HRUSKA. I still come back to this statement of yours in your testimony, "Patently it would have been appropriate for a judge whose entire professional life had been intimately connected with the Southern textile industry to have avoided deciding its most important case, especially where the litigant was a former client."

Now, let me suggest that during his tenure in the Supreme Court, Justice Goldberg sat in 29 of the 44 labor cases decided. He sat in seven cases in which AFL–CIO unions were parties. He sat in nine cases in which AFL–CIO had an indirect but significant interest in the outcome. Is he to be criticized for having done that?

Mr. SCHLOSSBERG. No, Senator. I think I have made my position clear on that. I do not think that because he was special counsel to the AFL–CIO that he could not sit on any labor matter, that was before the UAW had withdrawn from the AFL, almost the entire labor movement was in the AFL with the exception of the Teamsters Union and the Mine Workers. Every other union in the country was in the AFL. I do not think that his relationship with the parent body as a special counsel was so significant that he need disqualify himself from every labor case.

Senator HRUSKA. Of course here is a criticism and I have read it twice into the record, a criticism "especially where the litigant was a former client" it would have been inappropriate, so I take it that in the case of Justice Goldberg, it was all right, but in the case of Judge Haynsworth it was not?

Mr. SCHLOSSBERG. Well, Senator,——

Senator HRUSKA. According to your views?

Mr. SCHLOSSBERG. I think that is an inaccurate summary of my views and I think the record accurately reflects them.

Senator HRUSKA. Let the record speak for itself.

Mr. SCHLOSSBERG. Yes, sir.

Senator HRUSKA. In view of this language. And I here add a statement, which I will not read, concerning the issue of the background of judges.

(The statement submitted by Senator Hruska follows:)

STATEMENT BY SENATOR ROMAN L. HRUSKA

Mr. Chairman, a good many questions have been asked of the nominee regarding his past history, his law firm, his associations, his business connections.

It is certainly the prerogative of any Senator sitting on this Committee to ask such questions as he deems relevant. I have done it, myself, on the occasion of Supreme Court nominees and so have many of my colleagues.

It is important, however, in attempting to deal with a man's entire life in the matter of a few hours that we not lose our sense of perspective. If a man has had an active law practice, and certainly most nominees to the United States Supreme Court will have had an active law practice, he will have in his background numerous contacts with businesses and individuals. Most likely even a general practitioner will develop several specific kinds of clients. An attorney that handles business consultation matters normally will have represented many corporations while a man in practice in a rural area will not. A man practicing personal injury law may be a "plaintiff's" lawyer or a "defendant's" lawyer. Similarly, anyone engaged in criminal law practice can have his experience weighed on either the prosecution or defense side.

A distinguished attorney in any locality will likely draw clients representative of the economy of the area. A businessman selling a service will deal with the type of customers that exist in the area.

The Canons of Ethics are not so drawn that a jurist must withdraw or disqualify himself in a case in which one of the parties represents an industry, a philosophy, or a way of life with which he has been acquainted in personal life. They require him to withdraw if he represented a party, if he has a financial interest in a party, if he has a close association with a party, or if he has a substantial interest.

Just about this time of year, seven years ago—on September 11 and 13, 1962, this Committee met to consider the nomination to the Supreme Court of Arthur J. Goldberg. Then-Secretary of Labor Goldberg had a distinguished legal career as a labor lawyer. That was not his exclusive practice, particularly in his early years, but it was the area of law in which he built a proud reputation. And he represented only one side in labor matters—the unions. He served as General Counsel of the United States Steel Workers and as special counsel of AFL–CIO. Arthur Goldberg was approved by this Committee and confirmed by the Senate.

On Pages 13 and 14 of the hearings on his confirmation, I questioned Justice Goldberg on the issue of conflicts of interest. I ask unanimous consent that that portion of the hearing be reprinted in this hearing record at this point. (See attached). I will quote briefly from that exchange:

"*Senator Hruska:* Generally in appointments of this kind—certainly you were confronted with it when you were considered for confirmation to the Cabinet—we do ask some questions as to any possible interests which the nominee might have which might produce a conflict, any relationships or any status he has which might conflict with the official duties which he will assume.

"Is there anything that you can think of, Mr. Secretary, that would fall in this category?"

"*Mr. Goldberg.* Well, I was confronted with that problem when I became Secretary of Labor."

"And then, secondly, I announced at the time—and, of course, if I am confirmed here, it is obviously true—that under any circumstances, whether I am confirmed or not confirmed, that I do not and did not expect to resume any association, not only with that union, but any union, if I were to go back in the practive of law as an ex-Secretary of Labor. I would go back into general practice

and not the labor practice, and certainly not the practice of representing the Steelworkers Union.

"I did that, Senator Hruska, for a very simple reason, not because this is wrong—and I don't attempt to lay down this as a principle that any body else ought to follow—but the public is entitled to feel, it is not only the substance but the appearance that is important—the public is entitled to feel that an official of the U.S. Government is not treasuring as association and going, in the future, to capitalize an association which might lead him into any activity when the is functioning for the Government that might prejudice the position, in the public eye, of the Government.

"That is the fixed position with me, and that still exists." "

"*Senator Hruska.* I would like to make this observation. I think you are to be commended for both of these commitments which you have stated publicly before and which you now restate. As you know, the conflict-of-interest issues are difficult for this committee to pass upon and for the Senate to pass upon. And where we see that burden removed from our shoulders, that is a matter which I do believe is a proper subject for commendation, which I very forthrightly and happily extend."

Justice Goldberg's background of associations was obvious. He directed himself to the issue during the hearing at Page 8:

There is no more difficult task, because a person like myself who has led an active life and who has expressed himself on many subjects, who has had deep feelings about those subjects, which he still has—I am not a different person from the person that I have been in my prior appearances before the Congress—nevertheless, if I am approved by the Senate, when I take office as a Justice I would regard my first task and the primary task of being a Justice of the Supreme Court to be on guard, as Justice Brandeis said, lest my prejudices, my convictions, my predilections, are erected into legal principles.

"My obligation will be, if I am confirmed, and when I am confirmed, to enforce, as the Congress does in its own right and in its own way, and as the President does in his own way and in his own right, to enforce and apply the Constitution of the United States. That is a different obligation, much more serious obligation than the one that a private citizen has when he expresses himself on many problems."

It is clear, of course, that after his appointment Justice Goldberg did not disqualify himself from every case involving labor relations that came before the United States Supreme Court.

During his tenure on the Court Justice Goldberg sat in 29 of the 44 labor cases decided. He sat in seven cases in which AFL–CIO unions were parties. He also sat in nine cases in which the AFL-CIO had an indirect, but significant, interest in the outcome.

This is not to suggest impropriety on the part of Justice Goldberg. It merely illustrates that judges do not live in a vacuum, and cannot disqualify themselves every time a case comes before them which involves, however indirectly, an interest with which they may be identified. *Participation in labor cases while Associate Justice, U.S. Supreme Court*

Justice Goldberg sat in seven labor cases in which an AFL–CIO union was a party.

Local Union No. 189, Amalgamated Meat Cutters, AFL–CIO v. *Jewel Tea Company* 381 U.S. 676

Local Union No. 721, United Packinghouse Food & Allied Workers, AFL–CIO v. *Needham* 376 U.S. 247

Radio & Television Broadcast Technicians Union 1264, International Brotherhood of Electrical Workers, AFL–CIO v. *Broadcast Service of Mobile, Inc.* 380 U.S. 255

Calhoun, President or Peters, Secretary-Treasurer of District No. 1, National Marine Engineers' Beneficial Association, AFL–CIO v. *Harvey* 379 U.S. 134

Local No. 438, Construction & General Laborers' Union, AFL–CIO v. *Curry & Co.* 371 U.S. 542

International Association of Machinists, AFL–CIO v. *Central Airlines* 372 U.S. 682

NLRB v. *Eire Resistor Corp. and International Union of Electrical, Radio, & Machine Workers, Local 613, AFL–CIO* 373 U.S. 221

Justice Goldberg sat in five labor cases in which an AFL–CIO union was an interested party, although not a party to the action.

NLRB v. *Metropolitan Insurance Co.* (Insurance Workers International Union, AFL–CIO) 380 U.S. 438 (Mr. Justice Goldberg wrote the opinion)

Boire v. *Greyhound Corp.* (Street, Electric Railway and Motor Coach Employees, AFL–CIO) 376 U.S. 473

Liner v. *Jafco, Inc.* (Chattanooga Building Trades Council, AFL) (two member unions are parties) 375 U.S. 301 *NLRG* v *Exchange Parts* (International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL–CIO) 375 U.S. 405
NLRB v. *Reliance Fuel Oil Corp.* (Local 355, Retail, Wholesale and Department store unions, AFL–CIO) 371 U.S. 224

Justice Goldberg sat in four cases in which the AFL–CIO filed briefs as amicus curiae.

American Ship Building v. *NLRB* 380 U.S. 300
Republic Steel v. *Maddox* 379 U.S. 650
NLRB v. *Fruit Packers* 377 U.S. 58
Division 1287, Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. *Missouri* 374 U.S. 74

Justice Goldberg sat in 13 other labor law cases.

Ex Parte George 371 U.S. 72
Los Angeles Meat & Provision Drivers Union v. *United States* 371 U.S. 94
Burlington Truck Lines, Inc. v. *United States* 371 U.S. 156
Smith v. *Evening News Association* 371 U.S. 195
General Drivers, Warehousemen & Helpers, Local No. 89 v. *Riss & Co., Inc.* 372 U.S. 517
Brotherhood of Locomotive Engineers v. *Louisville & Nashville Railroad Co.* 373 U.S. 33
NLRB v. *Servette* 377 U.S. 46
Hattisburg Building and Trade Council v. *Broome* 377 U.S. 126
Local 20, Teamsters, Chauffeurs and Helpers Union v. *Morton* 377 U.S. 252
NLRB v. *Burnup & Sims* 379 U.S. 21
NLRB v. *Brown* 380 U.S. 278
Minnesota Mining v. *New Jersey Wood Finishing Co.* 381 U.S. 311
United Mine Workers v. *Pennington* 381 U.S. 657

A man who earned his reputation as an outstanding courtroom advocate, who appeared before the United States Supreme Court on many occasions, each time on behalf of the National Association for the Advancement of Colored People was Thurgood Marshall. Justice Marshall's association with the fight for civil rights earned him an enduring place in American legal history. He is a fine attorney and deserved his appointment to the United States Supreme Court. During the hearing on his nomination, he was asked:

"*The Chairman.* Now, if you are approved, you will give people in that area of the country (the South) and the States in that area of the country the same fair and square treatment that you give people in other areas of the country?"

"*Judge Marshall.* No question whatsoever."

Mr. Justice Marshall has participated in the resolution of civil rights issues since his elevation to the Supreme Court bench. The list of cases is not long, in part because of his work as Solicitor General in many of the cases that have come before the Court. Nonetheless he did participate in:

Coleman v. *Alabama* (exclusion of Negroes from Jury) 389 U.S. 22
Jones v. *Georgia* (exclusion of Negroes from jury) 389 U.S. 24
Sims v. *Georgia* (exclusion of Negroes from jury) 389 U.S. 404
Lee v. *Washington* (racial discrimination in prisons) 390 U.S. 333
Green v. *County School Board of New Kent County* (school desegregation) 391 U.S. 430
Raney v. *Board of Education of the Gould School District* (school desegregation) 391 U.S. 443
Monroe v. *Board of Commissioners of the City of Jackson* (school desegregation) 391 U.S. 450
Jones v. *Mayer Co.* (racial discrimination in housing) 392 U.S. 409
Hunter v. *Erickson* (fair housing ordinance) 393 U.S. 385
Gregory v. *Chicago* (civil rights demonstration) 394 U.S. 111
Daniel v. *Paul* (racial discrimination in private clubs) 395 U.S. 298

Mr. Chairman, I think the point is clear. No attorney, no judge, lives in a vacuum untouched by the world of commerce, the world of conflict. It is the duty of each man who assumes the bench to insure he is free of outside influence and is able to judge fairly and impartially each case that comes before him.

Senator HRUSKA. You refer to the so-called antilabor decisions of Judge Haynsworth, and I just want to say that there is a large body of pro-labor cases in which Judge Haynsworth participated. They

include at least eight prolabor opinions written by Judge Haynsworth, and an additional 37 prolabor opinions in which Judge Haynsworth concurred but did not write an opinion.

Mr. SCHLOSSBERG. May I comment on that, Senator?

Senator HRUSKA. Surely. I would like to have you do that. That is why I read it.

Mr. SCHLOSSBERG. I think that is a numbers game that is not going to get us anywhere. Let me make it clear that there are some cases that come before every Circuit Court of the United States, whether they are in the fourth circuit or the fifth circuit, or the eighth circuit, or the 10th circuit, or the second circuit, or even the District of Columbia circuit, some cases are so routine in the labor field, enforcing an arbitrator's award or enforcing an order of the board where there is substantial evidence and there is really nothing to the case.

Senator HRUSKA. Having held in favor of those that you represent, you find them routine and the result obvious, is that the idea?

Mr. SCHLOSSBERG. Pardon me, Senator, no. I want to finish my statement and then you may try to characterize it but I think I should be entitled to finish it. Some cases are so routine, Senator Hruska, so routine and so simple and require such little judicial worry on them, that in order to decide against the union you would have to put on a J. P. Stevens suit and doff your robes. You would have to disown the whole labor law in this country.

Senator HRUSKA. Without knowing to what cases I was referring I do not imagine you would exactly characterize each one of those cases that way, would you?

Mr. SCHLOSSBERG. No, I would not, Senator, but I did have a young man read all those cases.

Senator HRUSKA. It is a conceivable situation. But they were sufficiently important cases that in eight of them he wrote opinions. It could not have been very routine.

Mr. SCHLOSSBERG. They were so routine that nobody disagreed on them in that court.

Senator HRUSKA. That is a bold statement in view of the fact that you have not even considered the citations or the nature of the cases.

I am afraid, Mr. Chairman, we will have to leave for a vote on the Senate floor.

Senator HART. We will recess at this time and resume as soon as we vote.

(At this point in the hearing a short recess was taken.)

Senator ERVIN. The subcommittee will come to order.

Mr. Schlossberg, I want to read a statement from the first paragraph of Judge Haynsworth's opinion in the *Logan* case:

> Resolving the principal question presented we decline to enforce upon an order of the National Labor Relations Board requiring an employer to bargain with the union for neither the finding that the union represented the majority of employees nor the finding that the employer had no good faith doubt of it has evidentiary support in the record.

Now there was no appeal from the *Logan* case, was there?

Mr. SCHLOSSBERG. I am sorry?

Senator ERVIN. I say there was no appeal taken from the *Logan* case?

Mr. SCHLOSSBERG. No petition for certiorari?

Senator ERVIN. That is right.

Mr. SCHLOSSBERG. That is right.

Senator ERVIN. So evidently the attorneys did not have too much faith in their ability to get a writ of certiorari, or if they had gotten one to have it effect the decision adversely?

Mr. SCHLOSSBERG. No, I would not necessarily draw that conclusion, Senator Ervin. For instance, I am sure that you know that administrative agencies, when they lose a case, even though they may feel strongly about it, may decide that another case might be a better vehicle to have the Supreme Court speak on than that case, and I think unions have similar considerations, and I do not think that because a party did not go for certiorari in a particular case it means they liked it.

Senator ERVIN. Anyway, section 9(a) of the National Labor Relations Act requires an employer to bargain with a union in which a majority of the employees have selected or delegated to represent them?

Mr. SCHLOSSBERG. Correct.

Senator ERVIN. Section 9(b), the next section of that act, provides how they are going to determine what is an appropriate bargaining union?

Mr. SCHLOSSBERG. Provides a method, yes, Senator, a method, not the method.

Senator ERVIN. There is no other method employed anywhere in the act, is there?

Mr. SCHLOSSBERG. I am sorry.

Senator ERVIN. There is nothing else in the act?

Mr. SCHLOSSBERG. No, but as the Arkansas Oak Floor, Inc., case in the Supreme Court many years ago showed it was an alternative.

Senator ERVIN. That is right, but there are a lot of people that think that the act has been rewritten in the courts. Section 9(c) says in express words that where a question of representation exists, that is the right of the union to represent employees in a particular bargaining unit, either an individual employee or groups of employees or the union ean file a petition with the National Labor Relations Board, if the employer refuses to bargain with them; does it not?

Mr. SCHLOSSBERG. Yes, sir.

Senator ERVIN. And then it provides that the Labor Board will investigate the petition and if it finds that the question of representation exists then it will call a secret election, and it will direct the election and certify the results?

Mr. SCHLOSSBERG. Yes, Senator, but sometimes facts have proven that it is impossible to hold a secret election.

Senator ERVIN. Well, but that is what the Act of Congress says. I am just setting the background. The Wagner Act provides an alternative method. It says by a union or other means, the Wagner Act.

Mr. SCHLOSSBERG. Yes.

Senator ERVIN. When the Taft-Hartley Act was amended in 1947 they cut out any method to determine whether a union represented a majority except by secret election?

Mr. SCHLOSSBERG. That is right. Congress did not, however, show any intent to overrule Frank and all the other great cases.

Senator ERVIN. Section 8(a)5 makes it an unfair labor practice for an employer to refuse to bargain with a union, representing a majority of its employees, subject it says to section 9(a).

Now they held, which I think is a very unsatisfactory reason, but they did hold that since section 9(a) did not specify how they were going to be selected, the unions were going to be selected or designated, that section 8(a)5 required them to bargain under certain conditions regardless of whether there has been an election at all?

Mr. SCHLOSSBERG. Right.

Senator ERVIN. Which is a peculiar decision in my opinion, but it was made and I cannot controvert that.

Mr. SCHLOSSBERG. I happen to like it, Senator.

Senator ERVIN. Yes. Well, Judge Warren said in the *Gissel* case that the holding was based on the fact that section 9(a) did not specify how the representative was to be selected or designated. But 8(a)5 does not do that, either. However, 9(c) does specify and I have always heard in interpreting the statute that the expression of one thing is the exclusion of another.

A lot of people think that it was a bad construction of the Taft-Hartley amendments to allow the National Labor Relations Board to require an employee to bargain with the union on the theory that the union represented the majority of the employees unless there had been an election.

Mr. SCHLOSSBERG. Yes, Senator. Many people felt that way, but every circuit in the country except the Fourth Circuit in Judge Haynsworth's opinion felt that cards could be used.

Senator ERVIN. Yes, I know. Well, there are two——

Mr. SCHLOSSBERG. No, sir.

Senator ERVIN. Oh, yes.

Mr. SCHLOSSBERG. He said they are inherently unreasonable.

Senator ERVIN. He did.

Mr. SCHLOSSBERG. In fact he went one step further. He was going to ignore cards.

Senator ERVIN. Well, didn't they say back in the Arkansas case, before the Taft-Hartley Act was passed, that the best way to determine whether a union represented the majority of the employees was to have a secret election?

Mr. SCHLOSSBERG. Oh, yes, and I think that, too, Senator.

Senator ERVIN. And that is exactly what the National Labor Relations Board said and what I think everybody agreed.

Mr. SCHLOSSBERG. Yes.

Senator ERVIN. I think all of us agree if you want to get how Americans feel about anything the best way to do is to let them go in a private booth and vote their own conscience uninfluenced by management on the one hand and uninfluenced by the union on the other.

Mr. SCHLOSSBERG. But you cannot do that if the boss is shooting at you. You know, you cannot do it if he is coercing you and restraining you, making it impossible to have that secret election.

Senator ERVIN. Now, the courts ultimately held what I think was a wrong holding. That is, they held that while no employer could be compelled to bargain with a union on the basis of a card count, where

there was no unfair labor practice, under certain circumstances where there was an unfair labor practice, they could be compelled to bargain without an election or even in a case where the election had been adverse to the union under certain circumstances?

Mr. SCHLOSSBERG. Yes, sir, in two lines of cases.

Senator ERVIN. I will ask you if prior to the *Gissel* case, it was not held that an employer had a right to refuse, even though he committed unfair labor practices, unless those unfair labor practices affected the validity of a possible election, to bargain with a union as a representative of his employees if he honestly and reasonably believed that they did not represent a majority of the employees?

Mr. SCHLOSSBERG. No, sir, I do not think that was the law before Gissel. I think that the *Joy Silk* case, going back a long way back, that it did not matter what his belief was, if he destroyed the union's majority and coerced the members of the union so that they no longer were a majority, there could be bargaining ordered.

Senator ERVIN. Let us see what Justice Warren said about that. On page 592 of the *Gissel* case he said:

> The traditional approach utilized by the Board for many years has been known as the Joy Silk doctrine. Under that rule an employer could lawfully refuse to bargain with the union claiming representative status through possession of authorization cards if he had a "good faith doubt" as to the union's majority status; instead of bargaining, he could insist that the union seek an election in order to test out his doubts. The board, then, could find a lack of good faith doubt and enter a bargaining order in one of two ways. It could find (1) that the employer's independent unfair labor practices were evidence of bad faith, showing that the employer was seeking time to dissipate the union's majority. Or the board could find (2) that the employer had come forward with no reasons for entertaining any doubts and therefore that he must have rejected the bargaining demand in bad faith.

Then Justice Warren said that an example of the second category "was where the employer reneged on his agreement to bargain after the third party checked the validity of the card signatures and insisted on an election because he doubted that the employees truly desired representation," and then other things that are not material.

He said under the Joy Silk mills they seemed to cast the burden of proof on the employer to show good faith and reasonable doubt. Then came a long case of the *Aaron Brothers.*

Justice Warren continues:

> "A leading case codifying modifications of the Joy Silk doctrine was Aaron Brothers 158 National Labor Relations Board 1077, in 1966. There the Board made it clear that it had shifted the burden to the general counsel to show bad faith, and that an employer will not be held to have violated his bargaining obligations * * * simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority!"

Now, that was the route by which the National Labor Relations Board made decisions on this point at the time that the *Logan* case was heard and at the time that these three other per curiam opinions that went to the Supreme Court in the *Gissel* case were made. When the counsel for the National Labor Relations Board arose in the Supreme Court in the *Gissel* case, where these three cases had been consolidated with the case of another circuit, there for the first time the National Labor Relations Board changed its rule.

As Chief Justice Warren said:

Under the Board's current practice an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargain order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of fair elections.

Mr. SCHLOSSBERG. That was the point I was trying to make, Senator. I think that was the current practice before Gissel, but Senator, the important thing about Gissel, and I think we should focus on that, is that the Haynsworth—and we ought to get back to the fact that it is Judge Haynsworth we are discussing—that the Haynsworth description of the cards as inherently unreliable was completely rejected by every member of the Supreme Court, conservative and liberal alike, and I think we ought to remember that.

Senator ERVIN. But the law at the time Judge Haynsworth wrote the Logan case was that the question of the obligation to bargain was dependent on two things, the union having had a majority, and the bad faith of the employer.

Then they come up to the Supreme Court in the *Gissel* case, and the General Counsel of the National Labor Relations Board, for the first time, changes the rule by saying that the Joy Silk doctrine is virtually abandoned, and the question is not longer the question whether the subjective state of mind of the employer believed or had reasonable grounds to believe that the union did not represent a majority, so that rule went out of the window.

Mr. SCHLOSSBERG. Well, I don't want to argue with you, Senator, because I agree with what the Board's lawyer said on oral argument to the Board.

In other words, I believe that bad faith in the Joy Silk sense, that is in the sense of the majority, is implied by the employer's actions in Joy Silk, that when you set out to destroy the union's credibility with its members and to coerce the members and make it impossible for the union to maintain a majority, you can be assumed to have had bad faith.

Senator ERVIN. I am going to come to that in a minute, because I am not trying to ignore that circumstance.

Now then, the Supreme Court in the *Gissel* case approved of the new rule as announced on the oral argument by the General Counsel. That rule was that the question of the subjective state of the employer's mind was out of the window, and it became a question of simply whether there had been unfair labor practices, and whether they were such as to impair the holding of an election.

Mr. SCHLOSSBERG. Two issues.

Senator ERVIN. Yes.

Mr. SCHLOSSBERG. No. 1, were there sufficient unfair labor practices to make an election, the holding of an election impossible; and, No. 2, could you count a majority on cards?

Are cards—this is a question squarely faced—are authorization cards inherently unreliable, so that only a misguided person would rely on them, as Judge Haynsworth said, or were they like the rest of the Circuits and the Labor Board and the Supreme Court said?

Senator ERVIN. On those points there were a few other circuits that agreed with Judge Haynsworth's assertions.

Mr. SCHLOSSBERG. Not with a blanket rejection of cards.

Senator ERVIN. But here is what the Supreme Court said; they sent the cases back to the National Labor Relations Board.

Mr. SCHLOSSBERG. Right.

Senator ERVIN. Which required them to reverse everything that had happened as far as any adjudication had been made either by the National Labor Relations Board or by the circuit court of appeals. Here is what the court said on page 616 in the opinion:

Because the Board's current practice at the time—

That is the time that the cases were decided—

required it to phrase its findings in terms of an employer's good or bad faith doubts, however, the precise analysis the Board now puts forth was not employed below, and we therefore remain these cases for proper finding.

Mr. SCHLOSSBERG. Yes, sir.

Senator ERVIN. Now this is important. Judge Haynsworth's position was reversed not on account of what the circuit court had done, but on account of the fact that the Labor Board had tried these cases under one law that existed at the time they tried them, and they changed the rules on the oral argument before the Supreme Court.

Mr. SCHLOSSBERG. I understand your characterization of the case, Senator. The only thing, I think that case, the *Gissel* case and its relationship to *Logan* is important for the Haynsworth role vis-a-vis the Supreme Court.

Senator ERVIN. I am going to come to that.

Mr. SCHLOSSBERG. All right.

Senator ERVIN. I contend that what the court said in the *Gissel* case about the *Logan* case is dicta. It may be binding dicta, it may be the law in the future, but the reason the Supreme Court sent these cases back to the National Labor Relations Board and reversed all of them was because the National Labor Relations Board had applied the law that existed at the time of the trial and made the findings of fact on that basis. In other words, the findings of fact did not fit the new rule. Now that is the ultimate effect of this decision, and I will come to this other thing.

Now the Supreme Court in *Gissel* did discuss a difference with the *Logan* case, but the Court said that the *Logan* case does not repudiate the use of cards in all instances. They pointed out that in the *Logan* case the question was good faith of the employer. In that case the employer had four affidavits from four of his employees that the union organizers had represented to them that if they did not sign the cards, they would be denied employment in the plant when the union took over. That is what the record shows.

Now Judge Haynsworth in the *Logan* case pointed out that employees are guaranteed the right to choose their representatives by the National Labor Relations Act, and under amendments thereto a rejection of union representation is a concomitant right of equal rank and dignity with the right to select a union.

In other words, Judge Haynsworth said the right of the employees to select a union was on the same plane with the right of the union to seek their votes and to seek to become their representative.

Mr. SCHLOSSBERG. I agree with that. If the employer had not made a fair election impossible, I would prefer an election.

Senator ERVIN. Judge Haynsworth says in effect in this decision that he favors secret elections which is just what Chief Justice Warren said. That is also what the Labor Board favored, and what you said you favored and what I favored.

Mr. SCHLOSSBERG. Right.

Senator ERVIN. The best way to determine these questions is to give them a secret election.

Now he went ahead and said that a secret election was not necessary in all cases.

Now I will quote what Judge Warren talks about on that point to show that the difference between what Judge Haynsworth in the *Logan* case and what Chief Justice Warren said in the *Gissel* case is a mighty slight difference. It is all the difference between Tweedledum and Tweedledee. This is what Judge Warren says about this question:

Before considering whether the bargaining orders were appropriately entered in these cases, we should summarize the factors that go into such a determination. Despite our reversal of the Fourth Circuit below in Nos. 573 and 691—

That is the three cases that came from the fourth circuit—

on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order and reliance on a card, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices.

Mr. SCHLOSSBERG. Senator, if I may comment.

Senator ERVIN. It might be better just to finish this.

Justice Warren continued:

Such an order would be an appropriate remedy for those practices the Court noted—

That is the fourth circuit court—

if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies with the result that a fair and reliable election cannot be had".

Then Judge Warren goes ahead and says:

The Board itself has long had a similar policy of issuing a bargaining order, in the absence of section 8 (a)(5) violation or even a bargaining demand when that was the only available, effective remedy for substantial unfair labor practices.

In other words Justice Warren said the Board held something similar to the fourth circuit. He goes ahead and says:

The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process.

Now there is a very slight difference in what Judge Haynsworth said and what Justice Warren said. Judge Haynsworth said that in cases where the circumstance were so extraordinary that a fair and reliable election cannot be held, they could order them to bargain with the union on the basis of cards and Chief Justice Warren said

that the test is whether they have been guilty of unfair labor practices which makes it likely that a fair election cannot be held.

Mr. SCHLOSSBERG. May I comment, Senator?

Senator ERVIN. And Judge Warren said in this opinion, that the Supreme Court disagreement with the fourth circuit in these matters "is not large as a practical matter".

Mr. SCHLOSSBERG. May I comment, Senator?

Senator ERVIN. Yes, sir.

Mr. SCHLOSSBERG. First of all, let me say that Judge Haynsworth's view that he could order bargaining regardless of majority status, if the unfair labor practices of the employer were pervasive enough, is unrealistic, and I do not believe that the Board of the courts would have the power to do that.

I think there must be a majority at one time or another before the Board and the courts could do that. I suspect that Judge Haynsworth, in uttering that broad language, was somewhat like the character in "Alice in Wonderland," "Jam tomorrow, not today."

In other words, there could never be a situation where the unfair labor practices would be pervasive enough for him to go that far. The point is Chief Justice Warren was being very gracious, as he always was, and minimizing the difference between the fourth circuit and not saying that they did not have the power to do what Judge Haynsworth said they did, but what he said was differences as a practical matter are not large.

Senator ERVIN. That is what he said.

Mr. SCHLOSSBERG. That is what he said, and that was too gracious, I think, because the difference was tremendous. He said you can use cards, and Haynsworth had said you can't use them, they are inherently unreliable.

Senator ERVIN. He said you could use them.

Mr. SCHLOSSBERG. He preferred an election.

Senator ERVIN. Except where unfair labor practices showed that you could not have a fair election. Judge Warren said you could use them where the unfair labor practice showed that there was a likelihood that you could not have a fair election.

Mr. SCHLOSSBERG. As I read Judge Haynsworth's statement, if the unfair labor practices of the employer were pervasive and sweeping enough, he would not even inquire into the majority status. I am sure, Senator, that you would find that offensive, I know I do, that you would order bargaining with the union that never represented a majority of the employees.

Senator ERVIN. I think that the fair thing to do is let them have an election.

Mr. SCHLOSSBERG. So do I, and I think we have got to keep it clean and pure.

Senator ERVIN. I have run for office, and I have had people make all kinds of charges against me and all kinds of threats against me, but I have always found thus far that when the people have a secret ballot, they always vote for me in sufficient majorities to bring me here.

Mr. SCHLOSSBERG. Yes, sir.

Senator ERVIN. Now I think Chief Justice Warren was gracious, but I think he is also truthful and sound in his thinking.

Mr. SCHLOSSBERG. I certainly don't think he is untruthful. I did not mean to give that impression, Senator.

Senator ERVIN. You and I will agree pretty much on this question. That is, it is a very fortunate thing for us lawyers, as my old chief justice in North Carolina used to say, that we can read the same books and draw different conclusions from them. If that wasn't possible, we would not have near enough lawsuits to keep us all going.

Mr. SCHLOSSBERG. Senator, you are absolutely right.

Senator ERVIN. Thank you.

Mr. SCHLOSSBERG. Thank you, sir.

Senator ERVIN. I am not going to ask you about the other matters, because I think that the question of ethics is something the committee has got to determine for itself on the facts.

Mr. SCHLOSSBERG. I agree.

Senator ERVIN. And while it is helpful to hear the expression of the opinion of the witnesses on that point——

Senator ERVIN. That is a responsibility that rests on us.

Mr. SCHLOSSBERG. Thank you.

Senator HRUSKA. I have no further questions, Mr. Chairman, but I would like to reserve the proper space at this point in the record in which to insert a memorandum which is in process of preparation, concerning the labor and other cases to which attention has been brought by this witness and other witnesses along the same line. It would encumber the records unduly if we went into them case by case, but I would ask that unanimous consent to include it in the record.

(The information submitted by Senator Hruska follows:)

ANALYSIS OF AFL-CIO EVALUATION OF JUDGE HAYNSWORTH'S RECORD IN LABOR CASES

The AFL-CIO "appraisal" of Judge Haynsworth's labor opinions is incomplete and misleading. By no "objective" evaluation of Judge Haynsworth's labor opinions could the AFL-CIO conclude that he is "exceedingly anti-labor." The AFL-CIO attempts to do so by (1) failing to recognize the neutral character of several Supreme Court reversals of Fourth Circuit opinions (only two of which were written by Judge Haynsworth); (2) by erroneous characterization of a number of neutral opinions in which the Fourth Circuit was divided (only one of which was written by Judge Haynsworth) and failing to note several such "pro-labor" opinions; and (3) by failing to note over forty-five (45) other "pro-labor" decisions which Judge Haynsworth either wrote or participated in.

It is far from clear that a Judge's insensitivity to labor problems may be evaluated "objectively" by merely listing "anti-labor" *outcomes* of cases without regard to the merits thereof. The validity of the inquiry is irremediably prejudiced, however, when the cases to be evaluated exclude numerous "pro-labor" decisions by Judge Haynsworth, and instead focus primarily on opinions written by other Fourth Circuit Judges, the neutral character of which is distorted.

I

Labor Management and Other Cases in which Judge Haynsworth Participated that were Reversed by the Supreme Court.

The AFL–CIO "evaluation" of Judge Haynsworth's labor cases that were reviewed by the Supreme Court largely misconstrues the nature of the Supreme Court's decisions and draws the unwarranted conclusion that, measured against the Supreme Court, Judge Haynsworth is an "anti-labor" Judge.

Of the "ten" cases discussed by the AFL–CIO in their "Appendix A," only two involve opinions *written* by Judge Haynsworth. One of these, Darlington I (*Deering Milliken* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961))[1] only dealt with a procedural (rather than a labor-management) issue and cannot be characterized as an "anti-labor" case.

The other Supreme Court reversal involving an *opinion* by Judge Haynsworth was *NLRB* v. *Gissel Packing Co.*, 398 F. 2d 336 (4th Cir. 1968), *reversed*, 89 S. Ct. 1918 (1969)[2] *Gissel* cannot fairly be characterized either as an "anti-labor" case, or as one which reveals a significant difference between the labor-management views of Judge Haynsworth and those of the Supreme Court. The Supreme Court explicitly noted, in reversing:

"Despite our reversal of the Fourth Circuit below * * * the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter." (89 S. Ct. at 1940)

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[1] *Deering Milliken* v. *Johnson*, 295 F. 2d 856 (4th Cir. 1961) upheld the District Court's order, upon the application of Deering Milliken, enjoining the NLRB Regional Director from proceeding with a second remand order for further hearings in an unfair labor practice case arising out of Darlington's closing and liquidation. The Court held that the facts justified a finding that the Board's order would cause unreasonable delay, 5 U.S.C. §§ 1005(a), 1009(e)(A), (B)(1,3), but remanded with instructions to modify the injunction to permit facts concerning the merger of Deering Milliken into Cotwool to be made matters of record.

[2] *NLRB* v. *Gissel Packing Co.*, 398 F. 2d 336 (4th Cir. 1968), *reversed*, 89 S. Ct. 1918 (1969) was one of three *per curiam* Fourth Circuit cases consolidated for review by the Supreme Court, in which the Fourth Circuit had sustained the Board's findings as to § 8(a) (1) and (3) violations, but rejected the Board's findings that the employers' refusal to bargain violated § 8(a)(5). *Gissel* was based on the October 27, 1967 Fourth Circuit decisions *NLRB* v. *Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967) (Haynsworth, C. J.), *NLRB* v. *Sehon Stevenson & Co.*, 386 F. 2d 551 (4th Cir. 1967) (Haynsworth, C. J.), and *Crawford Mfg. Co.* v. *NLRB*, 386 F. 2d 367 (4th Cir. 1967) (Bryan, J.), *cert denied*, 390 U.S. 1028 (1968), which held that the 1947 Taft-Hartley amendments to the Act (which permitted the Board to resolve representation disputes by certification under § 9(c) only by secret ballot election) withdrew from the Board the authority to order an employer to bargain under § 8(a)(5) on the basis of cards (in the absence of NLRB certification) unless the employer knows independently of the cards that there is no representation dispute.

The Fourth Circuit had two objections to the use of authorization cards: (1) as contrasted with an election, the cards cannot accurately reflect the employees wishes, and (2) the cards are too often obtained through misrepresentation (that an election would follow) and coercion. The Fourth Circuit's view was supported by scholarly criticism of the Board's reliance on authorization cards, see Comment, *Union Authorization Cards*, 75 Yale L. J. 805 (1966), Browne, *Obligation to Bargain on Basis of Card Majority*, 3 Georgetown L. Rev 334 (1969); by Circuit Courts which rejected the Board's rule that the cards will be counted unless the solicitor's statements amounted to an assurance that the cards would only be used for an election, see *NRLB* v *S. E. Nichols Co*, 380 F. 2d 438 (2d Cir 1967), *Engineers & Fabricators, Inc.*, v. *NLRB*, 376 F 2d 482 (5th Cir. 1967); and by other Circuits which criticized the Board for applying its rule to mechanically, see *NLRB* v *Southbridge Sheet Metal Works, Inc* 380 F. 2d 851 (1st Cir 1967), *NLRB* v. *Swan Super Cleaners, Inc.* 384 F. 2d 609 (6th Cir. 1967), *NLRB* v. *Dan Howard Mfg , Co* , 390 F. 2d 304 (7th Cir. 1968), *Furrs., Inc.* v. *NLRB*, 381 F. 2d 562 (10th Cir. 1967) *UAW-CIO* v. *NLRB*, 392 F. 2d 801 (D C. Cir 1967).

Judge Haynsworth's concern with the inherent unreliability of a card check in determining the employees' real wishes cannot be described as "anti-labor." His *Logan* opinion indicates rather a sensitivity to employee-union relationships·

"As the affidavits tendered by the employer in this case indicate, unsupervised solicitation of cards may also be accompanied by threats which the union has the apparent power to execute. Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the card was signed." (386 F. 2d at 566.)

The Supreme Courts reversal in *Gissel* acknowledged both the difficulties presented by the Board's approach, and the proximity of its views with those of the Fourth Circuit

"Despite our reversal of the Fourth Circuit below * * * the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in "exceptional cases" marked by "outrageous" and "pervasive" unfair labor practices." [89 S. Ct. at 1940]

NLRB v. *United Rubber, Cork, Linoleum & Plastic Workers*, 269 F. 2d 694 (4th Cir. 1959), *reversed*, 362 U.S. 329 (1959) [3] was not an "anti-labor" decision. Judge Soper, in accepting the position urged by the NLRB, held that picketing by a union which does *not* represent a majority of employees is an unfair labor practice. The aim of Judge Soper was to *protect* employees rights under § 7 to refrain from bargaining through representatives without coercion. The Supreme Court's reversal does not purport to reject an "anti-labor" view with which it is unsympathetic. It rather utilizes the expression of Congressional intent—*subsequent* to the Fourth Circuit decision—embodied in the Labor Management Reporting & Disclosure Act of 1959 to resolve a difficult issue of statutory construction.

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[3] *NLRB* v. *United Rubber, Cork, Linoleum & Plastic Workers* (O'Sullivan Rubber Co.) 269 F. 2d 694 (4th Cir. 1959), *rev'd* 362 U.S. 329 (1959). It is unfair and incorrect to characterize the Fourth Circuit opinion by Judge Soper in O'Sullivan as "anti-labor", and equally misleading to state that the Supreme Court's reversal was a clear rejection of an anti-labor opinion.

What was at stake here was the Board's Curtis doctrine, *Curtis Brothers*, 119 NLRB 232 (November 4, 1957), which was aimed at implementing the Section 7 policy that employees shall have the right to bargain collectively through representatives of their own choosing and the correlative right to *refrain* from any or all such activity. *Curtis Bros.* held that peaceful picketing by a union which does not represent a majority of employees, to compel immediate recognition as the employees' exclusive bargaining agent, is an unfair labor practice under Section 8(b)(1)(A) of the N.L.R.A. Clearly the Fourth Circuit's acceptance of the Board's position cannot be interpreted as anti-labor." The aim of the Board was to *protect* employees' rights:

"To foist upon employees a bargaining representative unwanted by a majority of them thus clearly negates the statutory guarantee accorded to employees to select their own representatives or to have none at all." [Brief of NLRB in Drivers, etc. Local 639, 362 U.S. 274 (1960), October Term, 1959, No. 34, at p. 7]

The merits of this question were difficult to resolve, and the issue was one which had never been considered by the Supreme Court. The Fourth Circuit could obtain little guidance from other Circuits on this matter. The Ninth Circuit had upheld the *Curtis* doctrine in *Capital Service* v. *NLRB*, 204 F. 2d 848, 851-53 (9th Cir. ——), aff'd on other grounds, 347 U.S. 501 (—), [subsequently rejected in *NLRB* v. *Int'l Ass'n of Machinists*, 263 F. 2d 796 (9th Cir. 1959) *cert. denied*, 362 U.S. 940 (1960)] while the District of Columbia had rejected the doctrine in a divided opinion, Drivers Local No. 639 v. NLRB, 274 F. 2d 551 (D.C. Cir. ——), [subsequently *aff'd* 362 U.S. 274 (1960)]. There was *no* separate opinion by Judge Haynsworth. Judge Soper, for the majority, displayed no "anti-labor" sentiment in his opinion, which concluded:

"The circumstances under which this section was inserted in the Act support the view that it should be given a broad interpretation in order to protect employees from coercive conduct not only of the employer but also of labor organizations." [269 F. 2d at 699]

Chief Judge Sobeloff, dissenting, also found difficulty in reaching an unambiguous and clear interpretation of the applicable law:

"Whether or not the existing law forbids peaceful picketing or the publication of 'We Do Not Patronize' advertisements by a union, after employees in an election have rejected the union without choosing another, is not readily determinable by a mere reading of the statute. As the majority opinion recognizes, the legislative history is also inconclusive, each side to the controversy being able to cite expressions by Senator Taft and others to support its arguments." [269 F. 2d at 701]

The Supreme Court reversed the Fourth Circuit on the authority of *NLRB* v. *Drivers Local 639*, 362 U.S. 274 (1960) which upheld the District of Columbia rejection of *Curtis Bros.* 362 U.S. 329 (1960). The Supreme Court reached its decision, however, with the aid of the expression of Congressional intent embodied in the Labor Management Reporting and Disclosure Act of 1959, which was enacted *after* the decision in O'Sullivan and *after* certiorari was granted in Drivers Local 639. The language of the Supreme Court's opinion in *Drivers* does not purport to reject an impermissible "anti-labor" view, but is rather the resolution of a complex issue of statutory construction:

"We are confirmed in our view by the action of Congress in passing the Labor-Management Reporting and Disclosure Act of 1959. * * * To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongrous result implicit in the Board's construction by reading § 8(b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion of coherent national labor policy." [362 U.S. at 291-92]

United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 269 F. 2d 327 (4th Cir. 1959) (Soper, J.), *reversed in part*, 363 U.S. 593 (1960)[4] cannot be construed as an "anti-labor" decision. In *Enterprise* and two companion cases the Supreme Court reversed decisions of the Fourth (in part) Fifth and Sixth Circuits, and for the first time announced sweeping rules sanctioning a broad conscription of judicial power to review arbitration awards, except where there is "positive" and "forceful" evidence that the promise to arbitrate cannot encompass the particular grievance. On the face of the Supreme Court's opinion in *Enterprise*, the only vice of the Fourth Circuit's decision was that it upset an arbitral award which, the Fourth Circuit was convinced, was without a basis in the parties' agreement.

Thus apart from Darlington II & III, only *Washington Aluminum* can be fairly characterized as deciding a substantive point adverse to "labor;" the other cases are decided on neutral principles of law. It is significant that the Supreme Court has only reversed *one* labor opinion *written* by Judge Haynsworth, and did so on narrow grounds indicating a compatibility of views.

The AFL–CIO lists three further cases in its "Appendix B." Again, the cases do not support the proposition for which they are cited.

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[4] *Enterprise Wheel & Car Corp.* v. *United Steelworkers*, 269 F. 2d 327 (4th Cir. 1959), *reversed in part*, 363 U.S. 593 (1960). *Enterprise Wheel* arose from an action to enforce an arbitration award under Section 301 of the LMRA, 29 U.S.C. § 185, which in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957) had been interpreted as a mandate to federal courts to give specific enforcement to agreements for grievance-arbitration and to fashion a body of substantive law for all actions under that section for breach of labor agreements.

The grievance, which had been sent to arbitration under a court enforcement order, involved eleven workers who had been discharged for walking off their jobs. The arbitrator reinstated the workers after the collective bargaining contract had expired in spite of the fact that there was no contractual bar to their discharge. The company resisted the union's action to enforce the arbitrator's award on the ground that the arbitrator had exceeded his jurisdiction in making the award.

Prior to the principal case, the plaintiff seeking specific performance of a promise to arbitrate had to prove by a preponderance of evidence that defendant had promised to arbitrate the particular grievance. See Wigmore, Evidence §§ 2485, 2537 (3d Ed. 1940); Blume, American Civil Procedure § 2–03 (1955).

Following this principle, the Fourth Circuit, Soper, J., held that an arbitrator's award could not extend contract obligations beyond the contract term:

"The rights which the employees derived from the 1956–57 labor contract are not open to doubt. While it was in effect they could not be discharged without cause, but after it had expired their hiring was merely for an indefinite period which created an employment that either party might terminate at any time." [269 F. 2d at 331]

This view was supported by decisions in the Seventh and Tenth Circuits. [*Id.*]

Another difficulty with the arbitrator's award was that it was incomplete and indefinite. In ordering the company to compensate the employees for time lost, the arbitrator failed to account for amounts which were or could have been earned by the grievants in other employment during the contract term. The Fourth Circuit remanded for a completion of arbitration.

On appeal, the Supreme Court reversed in part, 363 U.S. 593. *Enterprise* was decided with two companion cases, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) which reversed the Sixth and Fifth Circuits respectively. In these three cases the Supreme Court considered for the first time the problem of the proper judicial approach concerning arbitrators' jurisdiction, and used these cases as the vehicle for announcing sweeping rules, sanctioning a broad conscription of judicial power.

Upsetting the doctrine that plaintiff must prove a promise to arbitrate, the Supreme Court held that a federal court must now have "positive assurance" shown by the "most forceful evidence" that the promise to arbitrate cannot be interpreted to encompass the particular grievance. (363 U.S. at 582–85.) Thus under a plain interpretation of the Supreme Court's language, the only vice of the Fourth Circuit's decision was that it upset an arbitral remedy which it deemed proscribed by the agreement. The agreement "could have provided" that the remedy for wrongful discharge should be reinstatement and back pay for the period after the agreement terminated; therefore, the arbitrator had the authority to determine whether the agreement should be so construed. (363 U.S. at 598–99)

Certainly the Fourth Circuit's opinion in *Enterprise* cannot be fairly termed "anti-labor" decision. It might be argued that an arbitrator, behind the shield of an ambiguous opinion can *now* make awards in excess of his jurisdiction without fear of judicial review. This being the case, there is much to be said for the Fourth Circuit's refusal to exercise their equitable powers, given its conviction that there was no rational basis in the parties' agreement either for recourse to arbitration or for the resultant award.

United States v. *Seaboard Air Line Railroad Co.*, 258 F. 2d 262 (4th Cir. 1968), *reversed*, 361 U.S. 78 (1959), the only one of the three opinions written by Judge Haynsworth, is only remotely a "labor" case at all, and is certainly not an "anti-labor" opinion. The issue was whether, as the government contended, train movements in a switching yard were "train movements" rather than "switching movements" within the meaning of the Safety Appliance Act. The Fourth Circuit rejected the government's contention.

Walker v. *Southern Railroad Co.*, 354 F. 2d 950 (4th Cir. 1965) (Bryan, J.), *reversed per curiam*, 385 U.S. 196 (1966)[5] was a neutral resolution of an issue of statutory construction which *followed* the recent Supreme Court suggestion in *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965) that exhaustion of RLA remedies was necessary before a breach of contract suit could be brought. The Supreme Court reversed—in a divided opinion—on the narrow grounds that Congress in 1966—*subsequent* to the Fourth Circuit opinion—indicated a dissatisfaction with RLA procedures.

Mitchell v. *Lublin, McGaughy & Associates*, 250 F. 2d 253 (4th Cir. 1957) (Soper, J.), *reversed*, 358 U.S. 207 (1959) was another neutral application of the facts of the case to divergent Supreme Court standards. The issue here was whether the activities of an architectural and engineering consulting firm were covered by the Fair Labor Standards Act or were local in nature. In reversing, the Supreme Court was divided, with Justices Whittaker and Stewart dissenting:

"Believing that the Court of Appeals did not err in deciding on which side of the shadowy line between such decisions as *McLeod* v. *Threllceld*, 319 U.S. 491, and *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, this case falls, I would affirm the judgment." [Stewart at 358 U.S. 216]

II

Labor Cases in which Judge Haynsworth Participated where the Fourth Circuit was Divided.

Part II of the AFL–CIO "evaluation" results in a distorted view of Judge Haynsworth's labor record, by failing to note several "pro-labor" opinions and by characterization of several neutral opinions as "anti-labor."

Of the sixteen cases listed in "Appendix C," only one of these was written by Judge Haynsworth, *Lewis* v. *Lowry*, 295 F. 2d 197 (4th Cir. 1961), and this was on sufficiency of evidence grounds.

The AFL–CIO acknowledges that three of these are "pro-labor"—namely *NLRB* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (4th Cir. 1963); *NLRB* v. *M. & B Headwear Co.*, 349 F. 2d 170 (4th Cir. 1964); *Dubin-Haskell Lining Corp.* v. *NLRB*, 386 F. 2d 306 (4th Cir. 1967). The AFL–CIO fails to mention further "pro-labor" (divided Fourth Circuit) opinions: *Arguelles* v. *U.S. Bulk Carriers, Inc.*, 408 F. 2d 1065 (4th Cir. 1969) (Boreman, J., Haynsworth, J., dissenting).

The AFL–CIO concedes that one of the sixteen cases is "neutral"—*Darlington Mfg. Co.*, v. *NLRB*, 397 F. 2d 760 (4th Cir. 1968). As indicated above, *NLRB* v. *Rubber Workers*, *supra*, must be characterized as neutral, contrary to the AFL–CIO evaluation. Four of the remaining cases were not decisions of labor-manage-

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[5] *Walker* v. *Southern R.R. Co.*, 354 F. 2d 950 (4th Cir 1965), *reversed*, 385 U.S. 196 (1966) is a neutral decision which involved the resolution of divergent Supreme Court opinions.

In *Moore* v. *Illinois Central R.R. Co.*, 312 U.S. 630 (1941) the Supreme Court held that a discharged railroad employee could bring an immediate action for money damages only (and not for breach of the collective agreement) in an appropriate state court as an alternative to following the administrative procedures of the Railway Labor Act.

In *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), the Supreme Court held that a non-railroad employee must exhaust grievance procedures specified in the collective bargaining agreement subject to the Labor Management Relations Act before bringing suit for breach of contract, in light of federal policy, reflected in the LMRA, favoring contract grievance procedures. The Court specifically reserved the question of whether *Moore* should be overruled with regard to contracts covered by the RLA. (379 U.S. at 657 n. 14.)

In *Walker*, the Fourth Circuit (Bryan, J.) relied upon *Maddox* and held that *Moore* was no longer the law, and that a fireman must exhaust his remedies under the agreement and before the Railroad Adjustment Board. The only other circuit court to deal with the impact of *Maddox* on *Moore* reached the same conclusion as the Fourth Circuit *Neal* v. *System Bd. of Adjustment*, 348 F. 2d 722 (8th Cir. 1965).

The Supreme Court reversed on the narrow ground that, *subsequent* to the Fourth Circuit decision, Congress in 1966 indicated "considerable dissatisfaction" with the operation of the National Railroad Adjustment Board. Based on this subsequent indication of Congressional intent, the Court held that exhaustion would not be required, citing *Moore*, and that the recent decision in *Maddox* would not be applied to cases governed by the RLA.

The majority's holding prompted a vigorous *dissent* by Justices Harlan, Stewart and White, stating that the decision in *Maddox* requires the explicit overruling of *Moore*, "a case that has already been all but vitiated by subsequent decisions." (385 U.S. at 199)

ment issues, but were decided on the grounds of the sufficiency of evidence to support the Board's charges. These are: *Wellington Mill Division, West Point Mfg. Co.* v. *NLRB*, 330 F. 2d 579 (4th Cir. 1964), *cert. denied* 379 U.S. 882 ( ); *NLRB* v. *Lyman Printing & Finishing Co.*, 356 F. 2d 884 (4th Cir. 1966); and *Lewis* v. *Lowry*, 295 F. 2d 197 (4th Cir. 1961) (Haynsworth, J.)—the latter is the only *opinion* by Judge Haynsworth of the 16 cases cited.

Additionally, the Fourth Circuit substantially enforced NLRB orders in favor of the Union (and against the employer) in three of the "Appendix C" cases: *Wix* and *Wellington Mill*, *supra*, and *Radiator Specialty Co.* v. *NLRB*, 336 F. 2d 495 (4th Cir. 1964).

It thus appears that at least six cases in "Appendix C" should be characterized as "neutral," and that at least six other cases in that category are "pro-labor," leaving seven "anti-labor" decisions. This "test" fails, contrary to the AFL-CIO suggestion, to confirm that Judge Haynsworth is "exceedingly anti-labor." [6]

III

"Pro-Labor" Opinions by Judge Haynsworth.

In light of the almost complete failure of the AFL-CIO to point to "anti-labor" opinions *written* by Judge Haynsworth in its "evaluation," one would surmise that either Judge Haynsworth has avoided writing labor opinions, or that the AFL-CIO has neglected to mention a number of cases in which Judge Haynsworth has supported the "pro-labor" position.

There are numerous such opinions, among which are the following:
Chatham Mfg. Co. v. *NLRB*, 404 F. 2d 1116 (4th Cir. 1968)
Intertype v. *NLRB*, 371 F. 2d 787 (4th Cir. 1967)
NLRB v. *Carter Towing*, 307 F. 2d 835 (4th Cir. 1962)
NLRB v. *Community Motor Bus Co.*, 335 F. 2d 120 (4th Cir. 1964)
NLRB v. *Electro Motive Mfg.*, 389 F. 2d 61 (4th Cir. 1968)
NLRB v. *Empire Mfg. Co.*, 260 F. 2d 528 (4th Cir. 1958)
NLRB v. *Webb Furniture Corp.*, 366 F. 2d 314 (4th Cir. 1966)
United Steelworkers v. *Bagwell*, 383 F. 2d 492 (4th Cir. 1967)

These opinions negate any "anti-labor" inference to be drawn from the three cases which the AFL-CIO cites in "Appendix D", one of which the AFL-CIO acknowledges was "close and difficult" and another which it terms "plainly correct."

IV

"Pro-Labor" Cases in which Judge Haynesworth Participated.

Not only has the AFL-CIO left out "pro-labor" cases written by Judge Haynsworth, but by carefully limiting their "examination" to "close" cases, the AFL-CIO has failed to note at least thirty-seven "pro-labor" cases in which Judge Haynsworth participated. It is not clear how the AFL-CIO can reconcile this omission with their stated goal of obtaining an "objective" appraisal of Judge Haynsworth's labor views. These cases are as follows:
Dubin-Haskell Lining Corp. v. *NLRB*, 386 F. 2d 306 (4th Cir. 1967), *cert. denied* 393 U.S. 824 ( )
Florence Printing Co. v. *NLRB*, 333 F. 2d 289 (4th Cir. 1964)
General Instrument Corp. v. *NLRB*, 319 F. 2d 420 (4th Cir. 1963)
Great Lakes Carbon Corp. v. *NLRB*, 360 F. 2d 19 (4th Cir. 1966)
Greensboro Hosiery Mills, Inc. v. *Johnson*, 377 F. 2d 28 (4th Cir. 1967)
Henderson v. *Eastern Gas & Fuel Associates*, 290 F. 2d 677 (4th Cir. 1961)
JNO McCall Coal Co. v. *U.S.*, 374 F. 2d 689 (4th Cir. 1967)
Link v. *NLRB*, 330 F. 2d 437 (4th Cir. 1964)

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[6] An allegation that a judge has made rulings adverse to a party is not sufficient to require disqualification on the ground of bias *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43-44 (1913); *Palmer* v. *United States*, 249 F. 2d 8 (10th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). "Impartiality is not gullibility. Disinterestedness does not mean childlike innocence. If the Judge did not form judgments of the actors in those court-room dramas called trials, he could never render decisions." *In Re. J. P. Linahan, Inc.*, 138 F. 2d 650 (2d Cir. 1943) (Frank, J.) A charge of bias can only be sustained where the language and actions of a judge indicate that he has formed such a strong opinion against the litigant as to impede his judgment. *C. f. Whitaker* v. *McLean*, 118 F. 2d 596 (D.C. Cir. 1941). Certainly the AFL-CIO does not seriously contend that Judge Haynsworth has such an "anti-labor" bias. A judge is not required to have no predispostion at all. "Judges, within the range granted them by law, will differ in their exercise of discretion according to their temperment and attitudes; for example a judge may acquire a reputation for being 'tough' or 'soft' on criminals * * *." Note, 79 Harv. L. Rev. 1435, 1448 (1966). see *Beland* v. *United States*, 117 F. 2d 958 (5th Cir.), *cert. denied*, 313 U.S. 585 (1941).

Mitchell v. *Emala & Associates, Inc.*, 274 F. 2d 781 (4th Cir. 1960)
Mitchell v. *Sherry Corine Corp.*, 264 F. 2d 831 (4th Cir. 1959), *cert. denied*, 360 U.S. 934 ( )
NLRB v. *Atkinson Dredging Co.*, 329 F. 2d 158 (4th Cir. 1964), *cert. denied*, 377 U.S. 965 ( )
NLRB v. *Baltimore Paint & Chemical*, 308 F. 2d 75 (4th Cir. 1962)
NLRB v. *Cross*, 346 F. 2d 165 (4th Cir. 1965), *cert. denied*, 382 U.S. 918 ( )
NLRB v. *Haynes Hosiery Div.*, 384 F. 2d 188 (4th Cir. 1967), *cert. denied*, 390 U.S. 950 ( )
NLRB v. *Jesse Jones Sausage Co.*, 309 F. 2d 664 (4th Cir. 1962)
NLRB v. *Jones Sausage Co.*, 257 F. 2d 878 (4th Cir. 1958)
NLRB v. *Lester Bros., Inc.*, 301 F. 2d 62 (4th Cir. 1962)
NLRB v. *Randolph Electric Membership Corp.*, 343 F. 2d 60 (4th Cir. 1965)
NLRB v. *Winn-Dixie Greenville, Inc.*, 379 F. 2d 958 (4th Cir. 1967), *cert. denied*, 389 U.S. 952 ( )
Ostrofsky v. *United Steelworkers of America*, 273 F. 2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 ( )
Overnite Transportation Co. v. *NLRB*, 327 F. 2d 36 (4th Cir. 1963)
Rosedale Coal Co. v. *Director U.S. Bur. Mines*, 247 F. 2d 299 (4th Cir. 1957)
Textile Workers v. *Cone Mills*, 268 F. 2d 920 (4th Cir. 1959)
Wirtz v. *Charlston Coca Cola Bottling Co.*, 356 F. 2d 428 (4th Cir. 1966)
Wirtz v. *DuMont*, 309 F. 2d 152 (4th Cir. 1962)
Williams v. *United Mine Workers*, 316 F. 2d 475 (4th Cir. 1963)
NLRB v. *Edinburg Mfg. Co.*, 394 F. 2d 1 (4th Cir. 1968)
NLRB v. *Marion Mfg. Co.*, 388 F. 2d 306 (4th Cir. 1968)
NLRB v. *Baldwin Supply Co.*, 384 F. 2d 999 (4th Cir. 1967)
NLRB v. *Weston Brooker Co.*, 373 F. 2d 741 (4th Cir. 1967)
Don Swart Trucking Co. v. *NLRB*, 359 F. 2d 428 (4th Cir. 1966)
Galis Electric & Machine Co. v. *NLRB*, 323 F. 2d 588 (4th Cir. 1963)
NLRB v. *Marval Poultry Co.*, 292 F. 2d 454 (4th Cir. 1961)
NLRB v. *Threads, Inc.*, 289 F. 2d 483 (4th Cir. 1961)
NLRB v. *Roadway Express, Inc.*, 257 F. 2d 948 (4th Cir. 1958)
NLRB v. *Superior Cable Corp.*, 246 F. 2d 539 (4th Cir. 1957)
NLRB v. *Kotarides Baking Co.*, 340 F. 2d 587 (4th Cir. 1965)

V. THE FOURTH CIRCUIT AND THE NLRB

It has been suggested that the Fourth Circuit, and Judge Haynsworth in particular, have consistently opposed the NLRB's efforts to secure workers' rights.

This contention is demonstrably false. As the following figures show, the Fourth Circuit's record—93%—in *enforcement of NLRB orders* is far better than that of Circuit Courts in the rest of the United States—81%.

	4th circuit, 1968–69	All circuits except 4th, 1968–69
Enforced in full	43	342
Modified	23	131
Enforced and remanded	0	10
Generally enforced	66	483
Percent of total	93	81
Remanded in full	0	25
Set aside	5	85
Generally denied	5	110
Percent of total	7	19
Total	71	664

Senator HRUSKA. That is all I have, Mr. Chairman.

Senator HART. Thank you very much.

Senator ERVIN. The next witness is Paul Jennings, president of the IUE–AFL–CIO.

TESTIMONY OF IRVING ABRAMSON, GENERAL COUNSEL, IUE–AFL–CIO

Mr. ABRAMSON. If it please the Chair, my name is Irving Abramson. I am the general counsel of the International Union of Electrical Radio & Machine Workers, and I ask leave of this committee to present the testimony that President Jennings could not give. He is tied up and could not come in, and I trust you won't object to my giving his viewpoints to this committee.

Senator ERVIN. You are not Mr. Jennings?

Mr. ABRAMSON. My name is Abramson, Irving Abramson. I am the general counsel of the union, and I ask permission to present testimony on his behalf.

Senator ERVIN. That is all right.

Mr. ABRAMSON. If it please the Chair, there was a memorandum or statement submitted by Mr. Jennings on September 11, 1969, analyzing the various cases that dealt with the labor decisions of Judge Haynsworth and some civil liberties cases.

We then submitted a supplemental statement dated September 17 containing some additional information that we secured, and by your leave, I am going to omit the reading of the original statement, and ask that that be made a part of this record, and I would like to address myself to the matters contained in the supplemental statement and feel free to depart from the reading of that from time to time, and make some additional comments with respect to some new information that we have got.

Senator ERVIN. That will be perfectly all right.

(The statements referred to follow:)

STATEMENT OF PAUL JENNINGS, PRESIDENT IUE–AFL–CIO

The International Union of Electrical, Radio and Machine Workers, AFL–CIO, joins with the unprecedented number of organizations that have urged the Senate to reject the nomination of Judge Haynsworth as a justice of the Supreme Court of the United States.

CONFLICT OF INTEREST CASES

We view as a serious conflict of interest Judge Haynsworth's retention of office and stock in Carolina Vend-A-Matic Company for six years after becoming a judge, and his sitting at least four times during those six years in cases which had as one of the litigants so substantial a source of income for Carolina Vend-A-Matic as Deering Milliken & Co., and its subsidiaries. These four cases are: *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (1961) in which Judge Haynsworth wrote the opinion for the court criticizing the National Labor Relations Board's handling of unfair labor practice charges against Deering Milliken and sustaining federal district court control over the extent of the N.L.R.B.'s investigation into the corporate relationship of Deering Milliken and its subsidiaries; *Leesona Corp.* v. *Cotwool Mfg. Corp., Judson Mills Div., Deering Milliken Corp.*, 308 F. 2d 895 (1962) in which Judge Haynsworth wrote the opinion for the court in a patent infringement case sustaining the legal position asserted by the Milliken group; *Leesona Corp.* v. *Cotwool Mfg. Co., Judson Mills Div., Deering Milliken Research Corp.*, 315 F. 2d 538 March 19, (1963) a patent licensing case decided in favor of the Milliken group; *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682 (argued June 13, 1963, decided November 15, 1963), a 3–2 decision with Judge Haynsworth's vote decisive in favor of Darlington Mfg. Co., a subsidiary of Deering Milliken, and which would, except for reversal by the Supreme Court, have saved the Milliken group many years back pay to approximately five hundred employees who lost their jobs because Darlington closed its plant to avoid dealing with the Textile Workers Union.

The letter of February 18, 1964, of the then Chief Judge Simon E. Sobeloff, of the United States Court of Appeals for the Fourth Circuit, states that Judge Haynsworth had been an officer of Carolina Vend-A-Matic Company prior to the time Judge Haynsworth became a judge in 1957 and continued to hold such office until after the Judicial Conference in the fall of 1963 adopted a resolution barring judges from serving as officers or directors of private corporations. From October 1958 to August 1963 Carolina Vend-A-Matic received $50,000 annually from Milliken Deering affiliates and beginning in August 1963, the receipts of Carolina Vend-A-Matic from Milliken Deering affiliates jumped to $100,000 annually.

Chief Judge Sobeloff's letter did not comment on Judge Haynsworth's stock holding. The newspapers have recently carried stories that the records of the Securities and Exchange Commission show that Judge Haynsworth was the owner of 18 shares, which constituted one-seventh of the entire stock of Carolina Vend-A-Matic Company on April 19, 1964, when he on that day exchanged his stock for 14,173 shares of Automatic Retailers of America, Inc. The closing price of ARA stock was $32.25 on that day. The newspapers quote Judge Haynsworth as having sold his stock in ARA immediately for "under the market price" and that he received less than $450,000. Judge Haynsworth had participated in the founding of Carolina Vend-A-Matic in 1950, when its total authorized capital was $20,000. Judge Haynsworth is quoted in the press as admitting having held his 18 shares from 1950 until 1964. Washington Post, August 24, 1969, p. A8.

This conduct of Judge Haynsworth flies in the face of several of the Canons of Judicial Ethics promulgated by the American Bar Association.

Canon 4 prescribes that a judge's conduct should be free both from impropriety and "the appearance of impropriety".

Canon 13 states that a judge "should not suffer his conduct to justify the impression that any person can improperly influence him."

Canon 24 bars a judge from incurring obligations which either interfere or "appear to interfere" with his judicial functions.

Canon 25 says "a judge should avoid giving ground for any reasonable suspicion" that his judicial office is being used for the success of private business venture; he should not "enter into any business relations which in the normal course of events might bring his personal interest in conflict with the impartial performance of his official duties."

Canon 26 bars his making investments in enterprises which are apt to be involved in litigation in the court and requires him to dispose of such investments previously made as soon as he can without serious loss. He is to "refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgement."

Canon 27, dealing with the judge as an executor or trustee admonishes that trust funds must not be invested in enterprises that are apt to be involved in questions of law to be determined by him.

Canon 29 states that "a judge should abstain from * * * taking part in any judicial act in which his personal interests are involved."

Here Judge Haynsworth's duty as an officer of Carolina Vend-A-Matic was to help it get all the business it could from Deering Milliken. Judge Haynsworth also had a personal financial interest to the extent of one seventh interest in all profits from the payments received by Carolina Vend-A-Matic from Deering Milliken. The situation in which he placed himself certainly gave the appearance of having a personal interest in favoring Deering Milliken. When on four occasions during the time he was an officer and held stock he sat and ruled in favor of Deering Milliken, he justified the impression of possible partiality due to his connection with Carolina Vend-A-Matic in violation of the above mentioned canons of judicial ethics.

Civil Rights Cases

Judge Haynsworth has a record of denying constitutional rights to black Americans which disqualifies him for a position on the Supreme Court. One of the most fortunate aspects of the past fifteen years is the great faith of all minorities which every member of the Supreme Court enjoyed. The continuance of this faith is essential to the future of our country. To allow anyone to become a member of that Court with a record which justifies distrust of his equal concern for the rights of minorities will weaken the fabric of our nation. The possible ill consequences of breaching the faith which our minority groups have had in the Supreme Court are ominous to contemplate.

In the field of medical care Judge Haynsworth, in three cases, announced his opposition to requiring a hospital to admit Negroes. The first case in which Judge Haynsworth sustained the policy of excluding non whites involved a hospital originally built by the City of Wilmington, North Carolina on public property and still located on the same spot and still the recipient of sizeable public funds. *Eaton* v. *Board of Managers of James Walker Memorial Hospital*, 261 F. 2d 521 (4th Cir. 1958), cert. den., 359 U.S. 984 (with the Chief Justice and Mr. Justice Douglas and Mr. Justice Brennan in favor of granting certiorari). At the time this case was decided the law in the Fourth Circuit was already settled that any publicly supported facility had to open its doors to all without discrimination. *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945).

In the second such case, Judge Haynsworth wrote a dissenting opinion when the majority of the court, sitting en banc, opened the doors of a hospital which had received more than a million dollars of funds from the federal government but had not a single bed for non whites. The majority held the separate but equal clause of the Hill Burton Act unconstitutional. *Simkins* v. *Moses H. Cone Memorial Hospital*. 323 F. 2d 959 (4th Cir. 1963), cert. den., 375 U.S. 938.

In both cases Judge Haynsworth took the position that the hospitals, despite their receipt of tax money collected from blacks as well as whites, were purely private institutions and hence not subject to constitutional limitations.

In the third case, *Eaton* v. *Grubbs*, 329 F. 2d 710 (1964) Judge Haynsworth wrote a separate concurring opinion stating that he was "still unpersuaded" but felt bound to concur because he considered the Simkins decision a binding precedent. In this third case the court, in an opinion by Judge Sobeloff, held that the James Walker Memorial Hospital should be enjoined from discriminating by excluding negroes.

In five school cases Judge Haynsworth voted to delay or weaken school desegregation plans. In four of these cases Judge Haynsworth was directly reversed by the Supreme Court and in the fifth indirectly overruled.

The most flagrant of these cases involved Prince Edward County, Virginia. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (1963), reversed 377 U.S. 218 (1964). In this case Judge Haynsworth's opinion and deciding vote was responsible for delaying, still further, relief from segregated schools in a case already twelve years old. The efforts of Negro children of Prince Edward County, Virginia, to obtain equal schooling began in 1951. Their suit was one of the cases the Supreme Court decided in *Brown* v. *Board of Education* 347 U.S. 483 (1954). The Supreme Court on May 31, 1955 issued a mandate to the lower courts to implement its decree with "all deliberate speed." In 1963, the decree still had not been implemented but instead all schools in Prince Edward County had been closed for four years. In that year the district court finally entered a decree requiring the schools to reopen and to operate nondiscriminatorily. It was this decree which Judge Haynsworth reversed in a two to one decision with Circuit Judge J. Spencer Bell writing a forthright dissent in which he termed Haynsworth's opinion "acquiescence in outrageously dilatory tactics." Judge Haynsworth had ruled that implementation must await a ruling by the state courts in Virginia on the validity of state legislation, which had already been tested by the school board without raising the contentions now made the grounds for further delay.

The Supreme Court immediately granted certiorari, stating as its reason for doing so "the long delay" (375 U.S. 391, 392). In its opinion the Supreme Court commented that the "original plaintiffs have doubtless all passed high school age", and that there had been "entirely too much deliberation and not enough speed in enforcing the constitutional rights" which the Court in 1954 held had been denied Prince Edward County Negro children (377 U.S. at 299).

In *Bowman* v. *School Board of Charles City County, Va.*, 382 F. 2d 326 (1967) Judge Haynesworth wrote the opinion for the majority of the court sitting en banc with Judge Sobeloff, joined by Judge Winter, writing a separate opinion (382 F. 2d at 330) criticizing the majority for not ordering immediate integration of school facilities. The majority voted to approve a so-called "freedom of choice" plan. In the companion case of *Green* v. *County School Board of New Kent County, Virginia*, 382 F. 2d 338 (4th Cir. 1967), vacated 391 U.S. 430 (1968) Judge Haynesworth similarly voted with the majority in a three to two decision to uphold the so-called "freedom of choice" plan of the school board which was merely an evasion of desegregation. This decision was vacated by the Supreme Court after it ruled that such plans deprived non white children of their constitutional rights.

Similar decisions by Haynsworth in the Richmond and Hopewell Virginia school board cases were also vacated by the Supreme Court. *Bradley* v. *School Board of Richmond*, Virginia 345 F.2d 310 (4th Cir. 1965), vacated 382 U.S. 103, *Gilliam* v. *School Board of Hopewell, Virginia*, 345 F.2d 325 (4th Cir. 1965), vacated 382 U.S. 103.

In a case in which the majority of the court held unconstitutional a pupil transfer plan as an evasion of the duty to desegregate, Judge Haynsworth dissented. *Dillard* v. *School Board of Charlottesville, Va.*, 308 F.2d 920 (4th Cir. 1962), cert. den., 374 U.S. 827.

In *Jones* v. *School Board of City of Alexandria, Virginia*, 278 F. 2d 72 (1960) Judge Haynsworth joined in a per curiam opinion to affirm the district court's denial of relief to twelve black students who had applied to transfer to white schools. The Court of Appeals, with Judge Haynsworth joining, stated that it was permitted to accept at full face value the school board's disavowal of discriminatory motives in denying the transfers.

Judge Haynsworth joined in a majority opinion which granted relief to three Negro teachers but denied relief to six. *North Carolina Teachers Assn.* v. *Asheboro City Board of Education*, 393 F.2d 736 (1968). All nine had lost their jobs as a result of school integration. Judge Sobeloff, dissenting as to the denial of relief to the six (393 F.2d at 747), criticized the majority for embracing the School Board's disavowal of discriminination as to the six when the court agreed that there was racial discrimination as to the three.

These cases demonstrate a segregationist point of view. Judge Haynsworth's sympathy with segregation was further evident in *Newman* v. *Piggie Bank Enterprises, Inc.*, 377 F.2d 433 (1967) modified 390 U.S. 400 (1968). There Judge Haynsworth joined with the majority to hold that attorneys' fees could not be awarded plaintiffs successful in cases under Title VII of the Civil Rights Act 1964, if the defendant had acted in good faith in his defense of the case. Judges Winter and Sobeloff disagreed with such a limitation on attorneys' fees. The Supreme Court in a per curiam opinion held that plaintiffs successful in such cases were entitled to attorneys' fees unless special circumstances not present in the case at bar rendered such an award unjust.

In a criminal case involving a Negro Judge Haynsworth has similarly been unsympathetic to the claim that police coerced the confession. In *Davis* v. *North Carolina*, 310 F.2d 904 (1962) Judge Haynsworth filed a lone dissent when the rest of the court sitting en banc reversed and remanded for trial the petition for habeas corpus of a prisoner awaiting execution who alleged that he was held incommunicado by the police for sixteen days and promised food if he would sign a confession. When the case again came before the court on an appeal from the denial of habeas corpus after the trial, Judge Haynsworth wrote the opinion of the court, with Judges Sobeloff and Bell dissenting in a most compelling description of police abuse. *Davis* v. *North Carolina*, 339 F.2d 770 (1964), reversed 384 U.S. 737 (1966). Judge Haynsworth affirmed the trial court's finding that the confession was voluntary although Judge Haynsworth noted that there was "a moral question as to whether one of Davis' mentality should be executed," but decided this was not for the courts. The Supreme Court agreed with Judges Sobeloff and Bell that the confession was involuntary. The prisoner was an impoverished Negro of third or fourth grade education, who first came in contact with police as a child when his mother murdered his father and thereafter had a long criminal record beginning with a prison term he served at the age of 15 or 16.

In a civil case with Negroes on both sides Judge Haynsworth wrote an opinion affirming the refusal of the trial court to allow counsel to question prospective jurors on *voir dire* as to their racial attitudes. *Nickelson* v. *Davis*, 315 F. 2d 782 (4th Cir. 1963).

All three branches of our government, the legislative and executive, as well as the judicial, are today agreed that the Constitution of the United States prohibits racial segregation. There must not be introduced into the highest court one not whole heartedly committed to full enforcement of the constitutional right not to be segregated and discriminated against.

Labor Cases

Judge Haynsworth's record in labor-management relations cases has been thoroughly reviewed by the AFL–CIO. We will not repeat that analysis. We agree it shows that Judge Haynsworth is extremely anti-labor.

We do wish to add a few additional cases in which Judge Haynsworth denied relief to workers in cases involving wages or personal injuries.

When a seaman fell overboard Judge Haynsworth absolved the captain of the ship of any duty to turn the ship around and search the seas for him because it was so probable that he had been cut to pieces by the propeller or eaten by sharks that a search would have been useless. Judge Haynsworth's view did not convince any of the other judges of his court who all sat en banc and held the widow could recover damages because there was no plausible explanation for the failure to search. The majority cited the high success of the Allies during World War II in searches where the individual had been in the water as much as 24 hours and cited one instance of a seaman who survived 56 hours of swimming, drifting and treading water. The law requiring the captain to make a search dates back many years and is well settled. Judge Haynsworth in the face of all this wrote a lone dissent explaining at length why he believed the search was so clearly useless as not to be required. *Garden* v. *National Bulk Carriers*, 310 F. 2d 284 (4th Cir. 1962), cert. den., 372 U.S. 913.

Judge Haynsworth applied a very narrow construction to the Jones Act in the opinion he wrote denying workers constructing a tunnel under water the right to sue for damages, holding they were not seamen and the equipment on which they worked not a ship. *Hill* v. *Diamond*, 311 F. 2d 789 (4th Cir. 1962).

Where a jury awarded the wife of a railroad employee damages for injuries which she sustained in a fall in the baggage room, Judge Haynsworth held the judgment on the award should be vacated because she was traveling on a "free pass" issued to her as the wife of a railroad employee and there was no proof that the baggage man invited her to enter the baggage room. *Gonzales* v. *B & O R. Co.*, 318 F. 2d 294 (4th Cir. 1963).

Judge Haynsworth wrote the opinion in *Wirtz* v. *Highway Transportation Co.*, 310 F. 2d 643 (4th Cir. 1962) reversing a judgment which had awarded truck drivers additional wages at a rate of time and a half pay under the Fair Labor Standards Act for hours in excess of 40 per week. Judge Haynsworth held the court had no jurisdiction to even hear the case on the merits because the Secretary of Labor rather than the individual employees had filed suit and the Secretary of Labor could only sue for violations which involved violation of construction of the Act which had finally been settled by the courts. The defense of the employer in this case was that he was subject to the Motor Carrier Act and hence subject to regulation by the ICC and that employees regulated by the ICC were exempt, contentions which had not then been finally settled by the courts.

In *Wirtz* v. *Modern Trashmobile Co.*, 323 F. 2d 451 (4th Cir. 1963) Judge Haynsworth similarly reversed a judgment which awarded wages due and enjoined further violations of the Fair Labor Standards Act. Judge Haynsworth held that a business engaged in picking up and incinerating trash in Baltimore even for companies engaged in interstate commerce was not in interstate commerce and even if it were, the retail exemption would apply.

In *Becker* v. *Philco*, 371 F. 2d 771 (1967) cert. den., 399 U.S. 97 9 Judge Haynsworth joined in denying a hearing to employees of defense manufacturers who lost their jobs as the result of what they alleged was a false and malicious libel by their employer in a report to the Defense Department. Judge Haynsworth held that the libel was absolutely privileged. Chief Justice Warren and Mr. Justice Douglas each wrote opinions explaining why they voted to grant certiorari.

These cases considered with the cases collected in the AFL–CIO analysis constitute further evidence of Judge Haynsworth's extreme anti-labor bias. They show that his antipathy is not limited to union organizations but extends to the injured employee or the widow of a deceased employee.

The same procrastination by Judge Haynsworth, so long drawn out as to constitute a denial of constitutional rights, evident in the further delay after twelve years in the Prince Edward County School cases, already described, appears in the labor cases.

In *United Steelworkers* v. *Bagwell*, 383 F. 2d 492 (1967) Judge Haynsworth delayed 20 months after oral argument in a case already more than a year old in issuing a decision involving nothing more than the simple application of law completely well settled by a well known line of Supreme Court decisions long antedating this case, as is evident from Judge Haynsworth's opinion.

The suit was one to enjoin enforcement of an ordinance of Statesville, North Carolina, requiring each solicitor of membership or distributor of literature to obtain a license from Statesville and making it unlawful to distribute handbills or circulars, soliciting membership in any association which charged dues, without

such a license. The row of Supreme Court cases squarely in point called for an immediate invalidation of the ordinance. The twenty months it took Judge Haynsworth to get around to issuing his decision denied the workers, whom the Steelworkers sought to organize, of their constitutional right to freedom of speech and press for so long a time as to make it clear that constitutional rights are not protected for workers.

Just as in the Prince Edward County School case all the original plaintiffs had passed high school age in the twelve years of delay, so here the organizing campaign of the Steelworkers in Statesville must have long since petered out in a setting of repression of rights protected by the First Amendment, which repression had been in effect for more than a year before Judge Haynsworth heard argument and then for twenty months thereafter. These are truly cases where justice delayed is justice denied.

The need for a Supreme Court which can guarantee speedy justice to all will be defeated by a confirmation of Judge Haynsworth for his record shows his decisions in these cases have resulted in such a long delay as to constitute an obstruction to justice.

The uniformity with which Judge Haynsworth has been reversed by the Supreme Court of the United States in labor and civil rights cases demonstrates the extent to which his thinking is out of line with accepted judicial decisions. The AFL–CIO analysis collected ten labor cases in which he was reversed by the Supreme Court of the United States. We have collected six civil rights cases in which the Supreme Court reversed Judge Haynsworth. In the civil rights cases, as in the labor cases, with only one exception, the reversal was concurred in by all the Supreme Court justices. Judge Haynsworth also is a frequent dissenter when the majority of his court upholds the constitutional rights of Negroes.

CONCLUSION

Our forefathers established as one of the checks and balances essential to our government, the duty of the Senate to decide whether a nominee for the Supreme Court should be confirmed. We believe that Judge Haynsworth should not be a member of the Supreme Court and that the Senate has the duty to reject his nomination.

It has always been important that all justices of the Supreme Court should epitomize justice and fair dealing. Today this is not only important, but crucial to the survival of our nation as never before. The conflict of interest issues which have been raised make it doubtful that Judge Haynsworth can ever enjoy public confidence.

Judge Haynsworth's decisions establish his antipathy to the constitutional rights of minorities as well as to Congressional enactments to protect the worker and his right to organize. The consistent reversals of his decisions by the Court he seeks to join demonstrates his insensitivity to the judicial protection of those rights.

We urge the Senate to deny confirmation to Judge Haynsworth.

SUPPLEMENTAL STATEMENT OF PAUL JENNINGS, PRESIDENT, IUE–AFL–CIO RESPECTING JUDGE HAYNSWORTH

On September 11, 1969 we submitted to the Committee an analysis of some of the decisions handed down by the Court of Appeals for the Fourth Circuit in which Judge Clement F. Haynsworth had participated.

We have since discovered eight cases wherein clients listed in Martindale and Hubbel as clients of Judge Haynsworth's firm in 1957 and 1969 appeared as litigants before his Court. Judge Haynsworth's decision in each of those cases was in favor of those clients and represents clear and compelling evidence of judicial impropriety and a conflict of interest. In one case he wrote a dissenting opinion favoring these former clients and in another he wrote the prevailing opinion. In another case his former firm represented both parties appearing before him.

The names of those cases are: George W. McCallum v. *Mutual Life Ins. Co.* 274 F. 2d 431 (1960); *Utica Mutual Insurance Co.* v. *Travelers Insurance Co.* 335 F. 2d 573 (1964); Donahue v. Maryland Casualty Company and Grubb v. *Travelers Ins. Co.*, 363 F. 2d 442 (1966); *Allstate Insurance Co.* v. McNeill 382 F. 2d 84 (1967); Bevans v. *Liberty Mutual Insurance Co.* 356 F. 2d 577; *St. Paul Mercury Insurance Co.* v. *Pennsylvania Lumberman's Mutual Insurance Co.* 378

F. 2d 312; Leesona Corp. v. *Cotwool Mf'g. Corp., Judson Mills Division, Deering Milliken Research Corp.* 308 F. 2d 895 (1962); Leesona Corporation v. *Cotwool Mf'g. Corp., Judson Mills Division, Deering Milliken Research Corp.* 315 F. 2d 538 (1963). The underlined parties appear in Martindale and Hubbel's directory of lawyers as clients of the Haynsworth firm in 1957 and 1969. The directory lists in 1955 the St. Paul Mercury Indemnity Company and in 1957 and 1969 the St. Paul Insurance Company as clients which would appear to be the same as St. Paul Mercury Insurance Company.

Judge Haynsworth lists among his assets twenty shares of Nationwide Life Insurance Company and 1000 shares of the Brunswick Corporation. We do not know whether he has held these shares at or about the time cases involving these companies were decided by Judge Haynsworth. We submit these cases for the information of the Committee in the event it has the dates when these stocks were acquired. *Brunswick Corp.* v. *J. C. Long* 392 F. 2d 337 (1968); *Nationwide Life Insurance Co.* v. *Attaway* 254 F. 2d 30 (1958). Nor do we know what connection if any Nationwide Corporation in which Judge Haynsworth owns 500 shares of stock, has with Nationwide Life Insurance Company. In both cases Judge Haynsworth decided for these companies.

We have also since examined the records of the Security Exchange Commission and the Department of Labor bearing on the subject matter and we take this occasion to include such information in the supplemental report and to offer additional comments on the qualifications of the nominee. Further, I request leave of this Committee to include a brief comment on the proceedings to date.

CONFLICT OF INTEREST

Contrary to the suggestions advanced in the defense of the nominee that his activities as an officer in the Carolina Vend-A-Matic Corporation were limited and that he was generally inactive, Judge Haynsworth's activities in that corporation were beyond stockholder-officer status. Records at the Security Exchange Commission show that Judge Haynsworth was also a trustee of the Corporation's profit-sharing and retirement plan in 1961 and that in 1962 Judge Haynsworth as Trustee on behalf of one party and his wife, Dorothy M. Haynsworth (as Secretary to the Corporation) on behalf of the other party signed an instrument amending the Profit Sharing and Retirement Plan.

As Trustee to a Retirement Plan for Vend-A-Matic's employees and officers Judge Haynsworth had the affirmative duty to exercise at all times his personal skill and prudence in protecting the interest of the beneficiaries of the Trust. Bogart, Trusts and Trustees, 2nd Ed. Section 612. Judge Haynsworth as Trustee had the obligation to administer the Retirement Funds committed to his trust which included the obligation to invest the funds entrusted to him. Judge Haynsworth could not avoid responsibility of a trustee by delegating any of his powers to anyone else.

An examination of the Labor Department's records would make it appear that Judge Haynsworth failed to comply with the law imposed on Trustees of a Retirement Fund. In 1959 Congress passed the Welfare and Pensions Disclosure Act 29 U.S.C. 301 *et seq.* Under the provisions of this law the Trustees as the administrator of the funds were required among other things to publish a description of the plan and file annually with the Secretary of Labor two copies of the plan and each annual report. We are informed by the Department of Labor, Welfare and Pension Reports that no such filing or disclosure was ever made as required by Section 307 of the Act.

We make no suggestion that the failure to file was deliberate or wilful. That would be a criminal offense 29 U.S.C. 308. We do suggest however that the corportate undertakings by which a Judge assumes the duties imposed upon him by law and the instrument creating his Trusteeship, poses potential conflicts which underlie the duty of a judge to desist from any such activities. For example Section 307(a) (1) and (2) of the Disclosure Act requires the administrator of the plan to make copies of the plan and the annual report available for examination by any participant and upon request of a participant to mail an adequate summary of the report to his last known address. Any action commenced in the Federal Court to enforce such rights or to compel compliance with the law, would present an immediate conflict between the litigant and the Trustee-Judge against whom such an action may be brought. Canon 24 of the Canons of Judicial Ethics to which w

refer in our statement of September 11, 1969, bars a judge from incurring obligations which either interfere "or appear to interfere with his judicial functions." Judge Haynsworth clearly overstepped the bounds of judicial propriety in maintaining his corporate positions while sitting as a judge in the Fourth Circuit.

STANDARDS TO BE APPLIED IN JUDGING AN ALLEGED CONFLICT OF INTEREST

I annex to this statement a memorandum from our General Counsel in response to my request to comment on the September 5, 1969 letter from William H. Rehnquist Assistant Attorney General to Senator Roman L. Hruska setting forth his views on the conflict of interest issue. It appears from that memorandum that Mr. Rehnquist was unable to cite a single federal court case to support his viewpoint while overlooking the recent decision of the United States Supreme Court that rejects his views.

As a layman I would like to comment on the standards to be established by the Judiciary Committee against which an alleged conflict of interest is to be measured in weighing the nomination of a person to be an Associate Justice of the Supreme Court of our land. The Committee, I feel confident will apply the highest standards possible and one that must be free from any taint of partisanship. We respectfully suggest that in establishing those standards each Committee member who will judge the nominee must himself be free of any appearance of a conflict of interest or a predetermined bias for or against a nominee.

I respectfully suggest therefore that a member of the Committee has not met that test if he in fact professionally represented the Darlington Mills before the Supreme Court in the very case that forms the basis for the conflict of interest allegations against Judge Haynsworth. The Deering Milliken Corporation at the time of the Darlington case was controlled by Roger Milliken President of the Darlingtod Mills and by other members of the Milliken family. I would accordingly urge that any such Committee member disqualify himself from passing on the qualifications of the nominee. Failing to do so would in a large measure denigrate the standards by which the Committee will judge others in the public's eye.

The record suggests that President Nixon could not have known the facts surrounding Judge Haynsworth's judicial record. At least it is inconceivable to me that President Nixon was made aware of the segregationist qualities of Judge Haynsworth's decisions which are a throwback to the pre Civil War days.

I trust that before the Committee acts it might afford the President an opportunity for a second sober judgment on his nominee for membership on the highest court in our land.

INTERNATIONAL UNION OF ELECTRICAL,
RADIO & MACHINE WORKERS, AFL-CIO-CLC,
September 16, 1969.

To: Paul Jennings, president.
From: Irving Abramson, general counsel.
Subject: Senate Judiciary Committee hearings on the nomination of Judge Haynsworth.

This memorandum is in response to your request that I give you my judgment on the legal conclusions arrived at by Assistant Attorney General William H. Rehnquist in his letter to Senator Roman L. Hruska on the conflict of interest issue in the Committee hearings on Judge Haynsworth's nomination.

Mr. Rehnquist in a 12 page letter came to the conclusion that Judge Haynsworth ought not to have disqualified himself in the case involving Darlington Textile Company, a company owned and controlled by Deering Milliken Company. He arrived at that conclusion after discussing both the facts in the Judge Haynsworth case and the applicable law as he saw it. However, the shortcomings of his analysis lie in the omission of some critical facts, presumably because they were not within his possession at the time he wrote it. Moreover he failed to include in his comments any reference to the most recent pronouncement of the United States Supreme Court on the subject matter. In fact as I point out later his letter deals with no federal court decision that is apposite.

Mr. Rehnquist neglects to deal with the issue arising out of Judge Haynsworth's clear duty to disclose to the litigants in the Darlington case the fact that the law firm in which he was the senior partner was listed in the lawyer's directory in 1956 as counsel to various textile mills including Judson Mills, a Deering

Milliken enterprise. I can only presume that Mr. Rehnquist was unaware of this fact for it is inconceivable to me that he would consciously omit any reference to this critical fact. This represents a pervasive issue separate and apart from Judge Haynsworth's financial interest in Carolina Vend-A-Matic and its business relations with Deering Milliken enterprises.

In Mr. Rehnquist's treatment of the conflict of interest issues stemming from Judge Haynsworth's activity in Carolina Vend-A-Matic, he overlooked the controlling case which is a recent decision by the United States Supreme Court.

The Supreme Court in *Commonwealth Coating Corp.* v. *Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, (1968) struck down an award by an arbitrator who failed to reveal that one of the litigants was a customer of the arbitrator who was an engineering consultant even though the relationship between them was not on a regular basis, such as existed between Carolina Vend-A-Matic and its customers to which it regularly supplied food in amounts far in excess of those involved in *Commonwealth Coating Corp.* The court laid down the rule of law in that case that arbitrators must disclose to the parties any dealings *that might create an impression of possible bias.* The court stated the rule as follows:

"But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trival business with a party, that fact must be disclosed. If arbitrators err on the side of disclosures, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award."

The court's ruling which in part rested on the 33d Canon of Judicial Ethics obviously applies with equal if not greater force to a Judge of the Court of Appeals. No less a standard of ethics can be expected from a member of the Supreme Court of the United States.

Mr. Rehnquist argues that Vend-A-Matic had only slightly more than 3% of its gross sales from the Deering Milliken plants and suggests that such a volume of business may not be the basis of any claim that Judge Haynsworth had a substantial financial interest in those transactions. I disagree. I regard a three per cent gross business as substantial. However, the Supreme Court of the United States has ruled that the amount of pecuniary interest by a judge in a case is irrelevant and that a decision will be set aside whenever there is the "slightest pecuniary interest on the part of the judge." *Tuney* v. *State of Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927). Mr. Rehnquist also overlooked this case in his discussion of the issues.

The only federal court decisions cited by Mr. Rehnquist were two cases that did not involve conflict of interest issues, but rather the issue of alleged bias and prejudice by a judge. *In Re Union Leader Corp.*, 292 F. 2d 381 (CA 1, 1961). *Wolfson* v. *Palmieri*, 396 F. 2d 121 (CA 2, 1968).

Finally one of the state court cases he does cite is one in which a judge was held to be disqualified and most closely resembles the facts in the Judge Haynsworth case. (*Vallego* v. *Superior Court*, 249 Pac. 1084 (1926)). In that case a judge was a stockholder in a bank which held a mortgage on property which was the subject of a condemnation action. The mortgagor (the bank) was not even a party to the action, nevertheless the judge was held to be disqualified. The mortgagee in that case is clearly a customer of the bank and is analogous to the Deering Milliken enterprises who were customers of Vend-A-Matic. In each case the enterprise in which the judge had an interest was not a party to the case. Mr. Rehnquist brushed aside his reference to that case with the careless comment that it had no bearing on the Judge Haynsworth case.

Finally the law is equally clear that ownership of stock in a corporation disqualifies a judge from acting in a case wherein the corportion is interested.

I direct your attention to the rule of law as set forth in American Jurisprudence, Volume 38, Section 129 as follows:

"Stock ownership in a corporation by a judge disqualifies him from acting in a case wherein the corporation is interested.[2] A stockholder in a private corporation is disqualified by interest to sit as a judge in a cause to which the company is a party,[3] or in which its interest as a director is immediately involved,[4] as in a suit which involves validity of bonds on the part of the corporation,[5] . . . ."

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[2] *Pavorite* v. *Superior Court*, 181 Cal. 261, 184 Pac. 15, 8 ALR 290; *State Ex Rel Colcord* v. *Young*, 32 Fla. 594, 12 So. 673, 19 LRA 636, 34 Am. St. Rep. 41.

[3] *Jarr Bank of Baker*, 111 Mont. 214, 107 P.2d 877; Anno: 10 ALR 2d 1332-1335; 48 ALR 617. As a relationship to stockholders as a disqualification see § 154 infra.

[4] Anno: 48 ALR 617.

[5] Anno: 44 ALR 191.

Mr. ABRAMSON. On September 11, 1969, we submitted to the committee an analysis of some of the decisions handed down by the Court of Appeals for the Fourth Circuit in which Judge Clement F. Haynsworth had participated.

We have since discovered eight cases wherein clients listed in Martindale and Hubbel as clients of Judge Haynsworth's firm in 1957 and 1969 appeared as litigants before his court. Judge Haynsworth's decision in each of those cases was in favor of those clients and represents clear and compelling evidence of judicial impropriety and a conflict of interest. In one case he wrote a dissenting opinion favoring these former clients and in another he wrote the prevailing opinion. In another case his former firm represented both parties appearing before him.

Mr. Chairman, before reading these eight cases, I want to say this: That after submitting the supplemental report, we came across additional cases, and I might say those additional cases represent or include some in which Judge Haynsworth decided against some of his former clients, and I feel obligated to bring them to his committee's attention. I have also come across additional cases in which he ruled in favor of his former clients, and I want to be sure that this record does contain a reference to both sides of the case, and I want to feel free to comment with respect to those matters.

The names of those cases are listed on the first and second pages of my memorandum, and I am not going to read them off, and save this committee the burden of listening to them, but I do want to read into the record the additional cases that we have got, two of which, in which Judge Haynsworth ruled against his former client, and two additional cases in which he ruled in favor of his former clients, following which I would like to make some appropriate comments.

In Travelers Insurance Company against Williams, 265 Fed. 2d 531, decided in 1959——

Senator ERVIN. 531?

Mr. ABRAMSON. 531, yes, sir.

Senator ERVIN. Nineteen what?

Mr. ABRAMSON. 1959. It affirmed the decision decided in 164 Fed. Sup. 566. In that case he held for his clients on the merits. The additional case in which he held for his clients in Metropolitan Life Insurance Co. against Grove, 271 Fed. 2d 918, decided in 1959.

Now two cases in which he decided against his clients represented by Paul Indemnity Co. of New York against Polad and Son, 270 Fed. 2d 156, decided in 1959, and Textile Workers Union of America against Cone Mills, 268 Fed. 2d 920. Now I would like to submit——

Senator ERVIN. When was that last case decided?

Mr. ABRAMSON. 1959.

Senator ERVIN. All four of them in 1959?

Mr. ABRAMSON. Yes, sir.

Now we have got a list of 10 cases in which Judge Haynsworth decided for his former clients, and two cases in which he decided against them. But I submit, Mr. Chairman, that really is not important. The cases that I represent to you do not and should not present a number's game. What is important to this committee, I believe, is to recognize and understand the rules that underlined a judge's

obligation at the outset of the case and before he makes his decision, so that my comments on this matter would be just the same if he decided every single one of these cases against his client.

Of course that is not so, and the reason for this rule, and it has been repeated time and time again, is that a judge must be above suspicion. Now I want to make two distinct comments about this matter which have not been made before.

To begin with, Judge Haynsworth, in explaining——

Senator ERVIN. Just to clarify the fact, do you take the position that a man who is a practicing lawyer, who subsequently becomes a judge, ought never to sit on a case that one of his former clients is involved in?

Mr. ABRAMSON. My position is essentially that a judge who had a client whom he regularly, and I underline the term regularly, because it is Judge Haynsworth who made that distinction, sir, and I will quote his testimony, who regularly represents that client, that he is obligated either to do one of two things, and I want to have the opportunity, Senator Ervin, to back up my statement with an opinion by the bar association, in which it ruled under one of the canons of ethics that he has got to do one of two things.

He has either got to disqualify himself, or to do the thing that Judge Haynsworth has not done in any of these circumstances, in these situations, including the 12 to which I refer, and I respectfully suggest that the thing that I believe Judge Haynsworth should have done has been done by every judge of every court, whether it be a county court or an appellate court or any other court. It is that kind of elemental canon of ethics.

Senator ERVIN. I don't believe you answered my question though. You say that a judge, a lawyer who subsequently becomes a judge, ought never to sit in a case which involves a person which in times past he represented as a lawyer?

Mr. ABRAMSON. Well, Senator, I believe that perhaps my judgment may not be as important as the judgment of the American Bar Association.

Senator ERVIN. I would like to have your opinion.

Mr. ABRAMSON. Yes, my opinion is that he should disqualify himself or, failing that, he should inform both parties about his former connections, and make that as a matter of record.

Now let me at this moment quote what the American Bar Association says under canon 13, and I trust, sir, that the canons as enunciated and interpreted by the bar association should be given some weight by this committee, and I would like to make some comment later on about a question put to one of the witnesses by a Senator here, who asked whether or not if a statute contains a lower standard of ethics than one enunciated by the bar association, which one, Mr. Witness, would you follow?

I was very disturbed, as a member of the bar for many, many years, to find a nominee for the Supreme Court of the United States suggested he would accept the lower standards, but I want to defer that comment lest I forget to read the comments under canon 13.

Canon 13 says the following:

A judge should not act in a controversy where a near relative is a party. He should not suffer his conduct to justify the impression that any person can im-

properly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any other party or other person.

Now I would like, if it please the Chair, to direct his attention to an opinion handed down under that canon by the committee of the bar association, and I refer to opinion No. 594 contained on page 206 of the American Bar Association's "Opinions on Professional Ethics." It is a book devoted and dedicated to decisions and opinions by the bar association on ethics, and that is what it says, sir, with respect to a judge, a judge's obligation to sit on a case wherein former clients are a party:

A judge is not prohibited from sitting in a case because his former firm is counsel in such case. However, to avoid any inference of impropriety, the judge should decline to sit where the case was in the firm at the time he was a member, where a regular client of the firm at the time he was a member is a party to the case, or where a son or other near relative employed by the firm had actively participated in the case.

So while the bar association is saying that as a matter of law he is not prohibited from sitting, that the standards of ethics addressed to judges, even they go as lowly as a justice of the peace, which addresses itself to the conscience of a judge, they suggest to him that he should not sit.

Senator ERVIN. Let me ask you a question at this point. Are you asserting that any one of these cases was in his office while he was a practicing lawyer and before he became a judge?

Mr. ABRAMSON. If he did that it would be utterly outrageous. I don't suggest that that is the case here.

Senator ERVIN. You don't say that?

Mr. ABRAMSON. That is not the case, sir. I say if he did that it would be utterly outrageous.

Senator ERVIN. But you are not charging that he sat as a judge in any case that he was an attorney in?

Mr. ABRAMSON. No, that is not what these cases represent, sir. These cases represent matters which fall squarely within the opinion handed down that I just read.

Senator ERVIN. Your opinion says that it is perfectly lawful or perfectly proper for him to sit.

Mr. ABRAMSON. No, it does not say it is proper.

Senator ERVIN. Read it again.

Mr. ABRAMSON. It says:

"A judge is not prohibited"——

Senator ERVIN. Yes, sir.

Mr. ABRAMSON (continuing). "From stting in a case because his former firm is counsel in such a case." And it then goes on to say to such a judge, "You should not sit." Nevertheless there is the absence of a statutory prohibition.

Now in this connection I think we have got the crux of what has been going on in this committee, and let me address myself to that, if it please the Senator. That relates to a question put by Senator Cook to Judge Haynsworth.

What he says is your judgment of section, as I recall, 455 of 28 U.S.C., sets the statutory standards of a judge, contains higher standards than those established by the ethical committee of the American Bar Association. Judge Haynsworth's reply in substance was as I recall it that he feels bound by the statute.

Now as an attorney, sir, I feel a bit shocked.

Senator ERVIN. He said he did not see any disagreement between the statute and the canon.

Mr. ABRAMSON. That is right. Yes, he preceded his comment, but concluded with the observation that he would feel bound to follow the statute.

Now I would like to have heard a nominee for the Supreme Court say that his observance would be not with the lowest standard of ethics, not with the medium standard of ethics, but with the highest standard of ethics, and I might say, sir, that in my many years of practice, whether I appeared before a county judge, a State judge, a Federal judge, or a circuit court judge, they have observed the long tradition that, as expressed by the opinion of the American Bar Association, if a judge felt that he was not disqualified as a matter of law to sit, he felt that the next best thing to do, which he must do, and that is reveal and disclose to the parties his former associations with a client.

Now I regret that the nominee in this case has failed not only to make these kinds of disclosures, but when I go on to other matters, he failed to make disclosures in cases where the responsibility was even higher.

Senator ERVIN. Mr. Abramson, what evidence do you have that he did not disclose in these cases? Now you were not there. There is nothing in the record to show that he did not.

Mr. ABRAMSON. Let me tell you the evidence that I feel I have, sir. I have got in my briefcase the written opinion of every one of these cases, and it has been by experience that when a judge brings this matter to the attention of the party, he normally includes that in his opinion, and in not one of these cases is there any reference to such disclosure having been made.

Senator ERVIN. Mr. Abramson, my experience is exactly the opposite of yours. I was a trial judge myself for 7 years, and when I went to my home county to hold court, if I had ever represented one of the parties that came before me, I always disclosed it, but I never did put it in the record.

Mr. ABRAMSON. Well, Judge, I have got some cases here——

Senator ERVIN. That is not a part of the record at all.

Mr. ABRAMSON. I tell you this. I have got some cases here in which the judge did make a disclosure, and frankly what is more involved, when we get to another aspect of the conflict of interest of Judge Haynsworth, even where it was made part of the record, the higher court said that in spite of that "We are not going to permit you to waive your rights," but that is departing now from the immediate subject matter.

Let me go on with respect to this matter. I want to read from page 158 of the transcript of the hearings, and that is what Judge Haynsworth said in supporting his position on taking these cases on, and I might add parenthetically he never suggested that he made a disclosure, and I assume that if he did, he would have told that to this committee. But this is what he said:

"Well, let's set out—I mean my relations were passed only because I had no interest in the law firm when going on the court in 1957

But I have not thought and I don't think it should be thought that I should not sit on cases in which casual clients of my former law firm might be involved. And I assume if you say my law firm represented St. Paul, that we did, but it was not a client that was very close to me. I own no stock in it. I had no interest in the outcome."

Now if it please the Chair, I have examined Martindale-Hubbel for the years 1955, 1956, and 1957, the 3 years immediately preceding the ascendancy by Judge Haynsworth on the court, and in every one of these cases which I cite preliminarily, before I gave the additional cases, the firm listed these clients in one of three categories.

One, it was either a representative client, or it was a general counsel, or it was the State counsel, no such thing as being a casual client. You could not under the stretch of any imagination at all include these clients under the criteria which Judge Haynsworth himself laid down.

Now I suggest therefore that these cases, taking the judge's own criteria, he just overlooked them, in these particular cases, and failed to follow them, the canons laid down by the organization which I am compelled to live by.

Now let me say this in addition. When it is suggested by a Senator that the statutory ingredients of the ethical conduct of a judge may be different or lower from those of a canon of ethics, let me say, sir, that the courts, including the Supreme Court of the United States, in a case to which I will refer, relies upon the canon of ethics, and the law making up the whole body of law of the canon of ethics takes into consideration those canons of ethics as enunciated by the American Bar Association.

Moreover, sir, I would say that the American Bar Association, when it lays down these canons, takes into consideration the common law and the body of laws surrounding it, so they are really interconnecting reciprocal suggestions, and you cannot separate the law from the canon of ethics as laid down by the organization of which I am a member, and which tells me how I am to behave.

Now let me go on to another area. Judge Haynsworth lists among his assets 20 shares of Nationwide Life Insurance Co. and 1,000 shares of the Brunswick Corp., and I might say here, too, we discovered some additional cases that I would like to bring to your attention, and I can't say too much more about it because I don't have much more information. The only thing that I can do is give to this committee the information I have.

I say in the statement we do not know whether he has held these shares at or about the time cases involving these companies were decided by Judge Haynsworth. We submit these cases for the information of the committee, in the event it has the dates when these stocks were acquired.

Then I go on to cite *Brunswick Corp.* v. *J. C. Long* (392 S. 2d 337) decided in 1968, and *Nationwide Life Insurance Co.* v. *Attaway* (252 Fed. 2d 30), decided in 1958.

Now, sir, I sat here, and of course listened to the Judge fill in the information that I did not have here and I hear that the Nationwide Life Insurance Co. stock was acquired in 1964, if I recall the testimony correctly. Now this case was decided in 1958, and therefore I can see

no basis of criticizing the Judge as far as the Nationwide Life Insurance Co. is concerned.

Now there are a couple of other cases that I have found since. Whether or not they have any meaning will depend, of course, on some additional information. I don't want to, to use the parlance of the trade, make a Federal case out of it, so to speak, until I know what the facts are, but my obligation is to bring them to your attention.

Judge Haynsworth owned some stock in the Grace Lines Co., and he decided a case in Farrow against Grace Lines (381 Fed.2d 280), in 1967. He decided this for the Grace Lines.

I can't tell you much more about that. I don't know when he bought the stock, and I am sure the committee, in view of this information, will determine it. Now the time of the stock ownership—maybe this case has no value to the committee at all.

Senator BAYH. Can you tell us what the Grace Lines case was, please?

Mr. ABRAMSON. Yes, this is a per curiam decision with Judge Haynsworth joining in affirmance of a judgment where the court properly refused to set over a jury verdict on the ground of inadequacy.

In other words, the plaintiff in that case had secured a judgment which it felt was wholly inadequate in view of the evidence. It appealed from that decision, and the court just sustained the lower court and refused to consider the contention that the verdict was inadequate.

Now I have got a case, and maybe I shouldn't even make reference to it because I recall, Senator Bayh, some interchange and discussion as to the Chesapeake & Ohio Railway, and perhaps I should just go on to more important things, but nevertheless I want to read this into the record for whatever value it has.

Senator BAYH. Let me refresh your memory. I ask my colleagues to yield.

In fairness to the Judge, that is a rather weak reed as far as conflict of interest is concerned.

As I recall, he only had $640 worth. I know for a fact it was only $40 dividends paid, and I can rely on the credibility of my financial expert witness, the Senator from North Carolina, who also had shares at $4 a share.

Mr. ABRAMSON. Well now, Senator, I was inclined to perhaps go along with you on just setting it aside, but frankly if this is the basis for your setting it aside, let me if I may express some disagreement with your judgment, for this reason.

Senator BAYH. You are not the first witness that has expressed disagreement with my judgment.

Mr. ABRAMSON. Let me give you the basic principal reason for it. When I come to the question as I hope to have an opportunity to do, of addressing myself to the contentions made by a number of Senators here who analyzed the 3-percent interest, and then came down to a sort of minutia stockholder's interest, I want to deal with what the court said about that, and I want to suggest to the Senator that the small amount of the interest by a judge who is a stockholder has no relationship to the basic principles that he should either not sit on the case or at least he ought to divulge the information and make a disclosure, no matter what that interest.

And let me add at this moment to say that I have no greater authority than the U.S. Supreme Court, which said any trivial interest, anything more than a trivial interest, is something which a judge ought to take into consideration.

Senator BAYH. I am well aware of the Supreme Court decision. The Supreme Court in that case talked about less than a 1 percent interest, but I must say as critical as I have been and as concerned as I still am about the Carolina Vend-A-Matic, and as I am about Brunswick, and I don't know about the Grace Lines and if you have others we want to have all this information, but I think there is such a thing that you can try to make too much out of a case that really isn't there and thus ruin your case.

Mr. ABRAMSON. I am not making anything out of it.

Senator BAYH. This unethical conduct I would not know about, but you are going to have to be a pretty persuasive witness to persuade me there is something unethical about that *C and O* case.

Mr. ABRAMSON. Senator, I preceded my comments about *C and O* by saying I just give this information. If I have to make a case out of it before I am through, Senator, there will be no question in your mind about what I intend to say and what I mean.

Senator BAYH. Forgive me for the interruption.

Mr. ABRAMSON. No, please forgive me for suggesting I have any criticism of your interruption. I welcome your participation in this discussion.

Senator ERVIN. I don't like to interrupt you, and I will try not to any more, but if you intimate that you are going to set all the Senator's rights in their thinking——

Mr. ABRAMSON. I can't hear you.

Senator ERVIN. You intimated there you were going to tell all the Senators where they were wrong about things, and if you take that time, we will be here until the last lingering echos of Gabriel's horn trembles into ultimate silence.

Mr. ABRAMSON. Well, Judge—I am not wrong when I call you Judge, I am familiar with your utterly brilliant career as a lawyer and a jurist, and I might add, as you know, having been your adversary in the *Darlington* case, about which I want to speak, before the Supreme Court, I have reason to know that you are a brilliant advocate.

SENATOR ERVIN. I don't mind being called judge, I think it is a compliment, but maybe I am in the same fix as a friend of mine down in North Carolina, who was a doctor and a lawyer both, and the doctors called him judge and the lawyers called him doctor, and both professions agreed that whenever one of his clients became his patient, that he performed a very necessary legal service for them when he drew up their last will and testament.

Mr. ABRAMSON. Senator, I hope you don't mind that if before I get through I may say some other things about not yourself personally but at least about some of the things which I feel, as I say in this paper openly, with all due respect to your brilliant career, that you should disqualify yourself from sitting on this case, but let me go on, and I will come to that point in due course.

Senator ERVIN. I will be glad to hear that, because I think that is the funniest thing I have heard since Bud Fisher started drawing Jeff and Mutt.

Mr. ABRAMSON. You had better say that more slowly. That must have been very valuable. I want to hear it.

Senator BAYH. Will our chairman introduce that case in the record?

Senator ERVIN. I said the idea that I as a U. S. Senator should disqualify myself in this matter is the funniest thing I have heard since Bud Fisher started drawing Jeff and Mutt.

Mr. ABRAMSON. Well, it may be just as funny as the other things that I have said, but I nevertheless will be that part of a comedian, if you think that is what it amounts to, Senator, but nevertheless let me get to three other cases, and again I don't know whether they amount to anything, but I am going to give you the record.

Listed among the stockholdings on Nationwide Corp., as I recall, which I think was 500 shares, and Nationwide Life which I dealt with, and which the Senator inquired about, and as I recall the shares were in 1964.

I have three cases involving the Mutual, the Nationwide Mutual Insurance Co., on which the judge sat, and the cases were as follows: Toole against Nationwide Mutual Insurance Co., 353 F.2d 508, 1965, Nationwide Mutual Insurance Co., against Appers, 340 F. 2d 150, and Johnson against Nationwide Mutual Insurance Co., 278 F.2d 574.

Now I want to mention these cases with a caveat that I have nothing at all in the record to suggest that these cases may or may not have any importance. As a matter of fact, I believe the Nationwide Mutual Insurance Co., while it is, I believe, an affiliate of the Nationwide Corp. in which he holds stocks, may be a mutual. I don't know enough about those cases or that firm to say much more.

Senator ERVIN. The judge testified they were entirely two different companies, and if you don't know anything about them, I don't see why you take up our time talking about things you know nothing about.

Mr. ABRAMSON. I think it is my obligation to give you cases, matters in which the judge sat, about which there may be a question, and I trust that the Senators will feel that it is important enough to look behind them. If I had another week or so to look at these things, I would give you the additional information, but I don't have it.

Now we have also since examined the records of the Securities and Exchange Commission and the Department of Labor. Incidentally, before I pass on, I want to say a few things about the *Brunswick Corp.* case, which has played such an important part in this case, as it should.

Now it has been suggested, Mr. Chairman, that the *Brunswick* case represented nothing but a pat case, so to speak, in which there are hardly any issues that were of any importance. I believe Judge Winter and Judge Haynsworth suggested that, and there was really nothing much to decide. Let me suggest that I believe there was reason to dispute that judgment.

To begin with, the *Brunswick* case, which is cited in 392 Fed. 2d 337, is a case which is six pages long dealing with principles of law and facts, and I want to quote from that case statements which suggest that on the face of this decision there appears to be a departure from the statutory requirements of South Carolina.

Now I don't know enough about the law of South Carolina to know

whether the appellant was right or whether it was wrong, but I do know that this is not a pat case.

In that case what was involved, among other things, was Brunswick's right to hold on to the capital which it recovered under the chattel mortgage as well as to take a judgment against the debtor, and that one of the issues in this case was whether or not the Brunswick Corp., having already attained a judgment, could at the same time hold on to the chattel.

Now the statute in South Carolina appears to prohibit that. Let me read from this very case, and I leave it to the Senators to determine whether or not, on the basis of what I am now about to read, that you can say that this is a pat case. I read now from page 343:

> We also find no merit in Beach's contention that Brunswick forfeited its right to possession of the chattels on which it held mortgages by taking a money judgement against Floyd Corporation. It is true "—this opinion goes on to say—" that the South Carolina claim and delivery action affords a restrictive remedy to a successful plaintiff. In other words, he is entitled only to a judgment for possession of the chattel which he sought to recover, or if return of the property is impossible, to a money judgment for its value.

Then the decision cites South Carolina Code section 10–2516, Wilkins against Wilamen, 128 South Carolina 509, 122 Southeast 503, 1924.

Then it goes on with this concluding sentence in this particular section:

> But the action brought by Brunswick was not merely for claim and delivery. In its complaint Brunswick requested possession of the chattels and—and it underlines the word "and"—"and a money judgment against Floyd Corporation, both remedies being available to it as a mortgagor."

Now the decision goes on to explain why this statute is not applicable, and it disagrees with some of the decisions cited, why it is not applicable, and I suggest to you, sir, that the principle involved in this case for the Brunswick Corp. can be of immense value to a corporation who goes out to get possession of its bowling alleys and at the same time try and get a judgment.

Senator ERVIN. Mr. Abramson, have you ever read the pleadings in that case?

Mr. ABRAMSON. Pardon?

Senator ERVIN. Have you ever read the pleadings in that case?

Mr. ABRAMSON. Of course not.

Senator ERVIN. How can you know more about the pleadings put in issue than the judges who decided the case, heard the argument and read the law?

Mr. ABRAMSON. Now, Senator, I have read and I am reading from this decision, and I say, sir——

Senator ERVIN. You——

Mr. ABRAMSON. Just let me finish, please, in response to your question. I say, sir, that on the face of this decision, and I am quoting the court, not my judgment, that they are setting aside the normal statutory construction which they previously gave.

Senator ERVIN. Mr. Abramson, what was involved in that case was determined by pleadings that you have never seen and never read, and if the rest of your testimony is on a par with this, why you are wasting my time.

Mr. ABRAMSON. I hope, sir, that when I bring some facts to the attention of this committee, that they will give it due consideration.

Senator ERVIN. I am not going to give any consideration to a man who is testifying as to what was involved in a case when he never saw the pleadings in the case.

Mr. ABRAMSON. Let me say this to you, sir. There isn't a lawyer in this committee hearing, let me say that, who when they refer to an appellate decision, have ever taken the trouble to go down and see the pleadings.

Now I have got the decision of Judge Haynsworth in my hand, and I am pointing out to you, sir, with my great and utmost respect, that on the face of this decision that it is not a pat case, and I would not care what the pleadings say, because I am relying on the decision itself, and nothing in the pleadings can divert me from it.

Senator ERVIN. The court was just saying that this was not simply a claim and delivery case, where the only thing you can recover is the property itself, and if it can't be recovered, then the value of the property puts in issue the question of damages. I can say that I have brought scores of cases, sometimes claim and delivery cases, and sometimes cases to get judgments and get a satisfactory judgment. They are two different kinds of cases, and that is just exactly what the court of appeals said.

Mr. ABRAMSON. Judge, I just read to you the statute which on its face says you can't have them both, and the court did not follow the usual statutory construction.

I am not saying that the court was right or wrong, but it is not a pat case. It took six pages of an opinion to substantiate its judgment.

Now let me say something else about that. The claim in Brunswick has been made that everything was all right because the stock was purchased after the decision was finally made.

Senator. ERVIN. But the point I am making, Mr. Abramson, we are not reviewing the decision in that case.

Mr. ABRAMSON. We are not what?

Senator ERVIN. We are only concerned with the——

Mr. ABRAMSON. Yes.

Senator ERVIN. It does not make any difference whether the South Carolina law was properly applied or whether it wasn't. We are not going to retry that case.

Mr. ABRAMSON. You are absolutely right, Senator. The only reason I brought this case to your attention is because the comments made by Judges Winter and Haynsworth were that this was merely pat, and I thought it might be relevant to show it is not pat.

Senator ERVIN. If you want me to testify frankly, I think they probably knew more about that case than you do.

Mr. ABRAMSON. I hope they did. They decided it.

Senator ERVIN. But I just think that time is of the essence, and we can't sit here and have you dispute a judgment which was approved by seven circuit court judges and two district court judges.

Mr. ABRAMSON. Let me go on to the next point about Brunswick, which I think has some crucial importance. The claims in defense of Judge Haynsworth are that the decision was already rendered some time in November of 1967. In effect it was rendered.

Now to begin with, before I discuss that matter, let me bring to your attention 280 South Carolina A, section 1291, which determines when you can take an appeal from that case. I am not going to burden you with it, Judge. You are a brilliant lawyer and you ought to know, as this section says, that——

Senator ERVIN. I am familiar with what that section says, but you could not take an appeal anyway. You would have to apply for a writ of certiorari, and they did apply for a writ of certiorari, and the Supreme Court refused to grant it.

Mr. ABRAMSON. Why don't you first let me finish what I have got to say about this section before you comment on it?

Senator ERVIN. What is the use of us taking up time to talk about a rule which has no relationship, because they did not appeal in time.

Mr. ABRAMSON. Judge, just hear me out before you form any conclusions about what I haven't yet said. What I am about to say, sir, if you please, I am about to give you my judgment on why that case was not concluded, and why it was still pending and why it was perfectly alive and not already decided, and please be good enough to let me tell you the reason why.

One of the reasons I attribute the suggestion that that case was not decided is that you cannot appeal from an informal decision, and that is what section 1291 says. Section 1292 gives you some exceptions to that, under interlocutory judgment. So that the case was still actually pending.

As a matter of act, if I recall the testimony, in December, long after Judge Haynsworth bought the stock, he had the memorandum opinion brought to his attention, and he made some corrections or some suggestions to Judge Winter about correcting it. And thereafter the matter came back to him by another memorandum in January, and thereafter a decision was handed down in February.

Now how, under any stretch of your imagination, a judge having participated in an examination of a decision, having made some comments on that, having made some suggestions to correct it, can it be said by anybody that the case was not pending, and he had not participated is just torturing logic, in my humble opinion.

Now the third point about this. The suggestion is that after all Brunswick represented, his ownership represented only 1,000 shares of 8 million. Well, let me say this.

The judge owned J. P. Stevens, 500 shares. J. P. Stevens is capitalized at an outstanding shares, as I recall, of 6 million. Now I don't suggest that there is going to be a very important or substantial difference in the equation between 1,000 against 8 million in Brunswick, or between 500 and 6 million in J. P. Stevens, and yet the judge disqualified himself in J. P. Stevens. Now at this moment I want to take the occasion——

Senator BAYH. Will the witness yield just a moment, please? May I pose a question? You may or may not have been in the room, Mr. Abramson, when we had a chance to ask Judge Haynsworth that question a couple of times, and he suggested that the reason he disqualified himself was not the stock ownership but because of the past relationship which was such that even if he had not had the stock he could not have sat.

Now I don't know whether that changes your analysis here. And whether it does or not, you might give some thought to the question that has been in the back of my mind, namely even given that prior relationship which would preclude him from sitting, does not the canon of legal ethics which says you should not invest in stock which is apt to be the subject of litigation, does not that canon still apply?

I really haven't answered that in my own mind, but it would seem to me that just because you have had a prior relationship with a company that would preclude your sitting, and you also own stock, that does not necessarily say that you should not follow the canons of ethics about disposing of that stock. I don't know. I don't want to detract you.

Mr. ABRAMSON. You are not detracting me, Senator. I think you are right on the ball, and I think this is the issue, because I think it was Senator Cook who suggested that we should not adopt the ethical standards which no mortal man can achieve.

Now let's look at that. Let's look at whether Judge Haynesworth was faced with a choice which no mortal man could achieve. Now having already found, following the purchase of the stock, that he was involved in a case, in December and in January and in February, he had one of three choices to make which, as a mortal, could not have been very painful. He could have brought his colleagues together and said, "Look, I find I am involved in a case in which I own stock. I want to disqualify myself."

Or he could say, call his colleagues together and say, "Look, I feel I owe the obligation to make a disclosure, and I want to call the parties together and make that disclosure." That is the least he could have done.

And No. 3, he could have disposed of the stock. Now there is no suggestion by Judge Haynesworth that the disposal of the stock would have incurred a great financial loss. I haven't heard any suggestion. So you have three alternatives, none of which seemed to occur to him, each of which at least was required by a medium standard of ethics followed by any judge, including a county judge. Have I answered your question, Senator?

Senator BAYH. Yes, you have.

I notice we have a rollcall. I will ask my colleagues to bear with me a minute. I don't know whether I am going to be able to come back after this rollcall.

Could I ask you to go to page 6 and answer a question that is raised in your testimony there relative to one member of our committee. I can't quite see the logic, though I concur in much of the judgment you make in your testimony, Mr. Abramson, Mr. Jennings?

Mr. ABRAMSON. Abramson is the name. I am his counsel.

Senator BAYH. I guess the reason I said Mr. Jennings is that I wondered if you could give us your opinion of the legality or the merit of the Jennings' statement on page 6, which suggests that the Senator from North Carolina should be disqualified from sitting on this case. That seems like it may be stretching a point a bit there.

I disagree with some of my worthy colleague's opinions, and I am sure he disagrees with some of mine. I am not too sure which is right. But I certainly feel that he does the best he can, as much as he

humanly can, to make a reasoned judgment on this. I would appreciate your giving me your opinion on that before I leave.

Mr. ABRAMSON. Senator, I am grateful for your giving me the opportunity to answer that question, and I am glad it is not as funny to you as it might appear to some other Senator. But I am dead serious about this; not only dead serious, but I think it poses the underlying question before this committee, and I say this respectfully to Senator Ervin, for whom I have the highest regard as a scholar, as a former judge, and as a brilliant lawyer, and I hope he does not take this personally.

I would have said that about anybody.

I was involved and argued this *Darlington* case before the U.S. Supreme Court, and the Senator was my worthy adversary. He then represented Darlington Manufacturing Co. Now, the president of Darlington Manufacturing Co. is Roger Milliken. The president of Deering Milliken is Roger Milliken. It was a family-owned corporation. Everybody owned each other. So that, in effect——

Senator BAYH. You are not suggesting that any of them owned the Senator from North Carolina?

Mr. ABRAMSON. No; wait a miuute. I am not suggesting that, but I am suggesting this, sir: that when the Senator was hired and retained by a private client to argue the case of Milliken before the U.S. Supreme Court, and I have my reservations even about his propriety of doing that, but when he did that and Deering Milliken is the focus of attention before this committee, it is the *Deering Milliken* case around which the whole conflict-of-interest case is centered, and you therefore cannot pass objectively on all of the questions surrounding *Deering Milliken* when you have been Deering Milliken's lawyer in this very case.

Now, let me add this, and I will be finished. It is not a case where he may have represented Deering Milliken at one time. Senator Bayh, I am talking about the lawyer who represented Deering Milliken in this very case; and I ask you, sir, can a lawyer who represented Deering Milliken in this very case, who propounded and argued the very issues that are being talked about here, and that I hope I will be able to straighten Senator Ervin out about some of the things he said, can he be objective and render an objective opinion about that?

My judgment is no. I think the standards of ethics——

Senator ERVIN. Mr. Abramson, the members of this committee have got to go and vote.

Mr. ABRAMSON. Will you let me finish when you come back?

Senator ERVIN. Your logic is faulty. Deering Milliken is not the nominee for the Supreme Court. Darlington is not the nominee. I appeared in court in behalf of Darlington Mills. Judge Haynsworth decided the case against Deering Milliken and I ought to be prejudiced against him.

Mr. ABRAMSON. Senator, just one-half minute and I won't impose on you. Let me say this.

In my judgment, the underlying central issue before this committee is what standard of ethics in determining conflicts of interest are you going to adopt in assessing the qualifications of Judge Haynsworth. It seems to me, therefore, that the mores, the thinking, the standards of this committee are inherently in issue, and I suggest therefore that

any member of this committee who has himself posed a conflict by his representation of Deering Milliken, and sits on judging his own client, sets forth the kind of standards which I don't believe this committee ought to adopt in adjudging the qualifications of Haynsworth.

Senator BAYH. The only reason I raised this question, Mr. Abramson, is that if indeed we were talking about the specific issues, the closing down of the plant and all of this right now, I would be the first to say that I think my friend from North Carolina would find it almost impossible to make a nonbiased judgment on this, but it seems to me that that is not what we are deciding.

We are deciding whether the judge in South Carolina in the fourth circuit involved in that case was adhering to the standard of conduct, and I have great doubt about that, but I must say that doubt doesn't spill over on the ability of any member of this panel.

Mr. ABRAMSON. Senator, I am not living as Alice in wonderland, and I fully understand and appreciate the position of every Senator on this committee. I am realistic.

I understand what things some Senators have to do and say in terms of at least extending the usual amenities to another member of the committee, but I can't help but post the basic ethical question that the Senator's participation in this particular case poses, and you cannot avoid it, in spite of the niceties which I think you are bound by, and I say that respectfully.

Senator BAYH. I did not raise it because of the niceties, because Senator Ervin and I have had some rather vigorous dissents and dispute on this, and I would not be at all surprised if we have a few more before we are through, but I must say I think that is going a bit far.

Senator HART. We will recess and resume following the vote.

(Whereupon, there was a short recess.)

Senator ERVIN. The subcommittee will come to order. You may resume your testimony.

Mr. ABRAMSON. Thank you, Mr. Chairman. I appreciate your indulgence in staying this late to hear the balance of this, and I will try not to indulge too much on your patience.

I just want to conclude one aspect of my comments, and read into the record what the body of law says, concerning the disqualification of a judge to sit by reason of his holdings, of stock in a corporation.

I might add at the outset that the body of law is practically unanimous about this felling, and there are no two questions about it. Corpus Juris Secundum in the section on judges, section 80, puts it very simply:

> It is the generally accepted rule that a stockholder, officer or director in a corporation cannot sit as a judge in an action in which such corporation is interested, such interest being sufficient to disqualify him.

In the American Jurisprudence, there is a quotation, section 12, which I have included in my paper, and I therefore will not burden you by reading, but it is generally to the same effect, indicating the great weight of authority in disqualifying a judge who has stock ownership.

There is one particular case that I thought might be of interest to this committee, and that is *Pahl* v. *Whit*, 304 Southwest (2d) 280.

In that case a judge was a member of a cooperative organization which had 5,000 members. He was but one of 5,000. He sat on a case which involved the interest of this cooperative, and I want to read to this committee what the court said about his interest, which is just one five-thousandths, and about his qualification to sit on such a case.

I quote from the court—

It is to be regretted that a judge should try a case in which there is the least ground upon which to base a claim for his disqualification, and if an error is ever to be made as to his disqualification, it should be in favor of the disqualification rather than against it.

And I might add, Mr. Chairman, parenthetically that this idea that the judgment of error should be made in favor of the disqualification has been repeated by courts time and time again as well as by the Supreme Court of the United States in the *Commonwealth* case that has been referred to—

An independent, unbiased disinterested fearless judiciary is one of the bulwarks of American liberty, and nothing should be suffered to exist that would cast a doubt or shadow of suspicion upon its fairness and integrity.

Finally, the Court winds up saying this:

It is true that his interest may be very small.

Referring to his interest of one out of 5,000—

And we are certain that the trial judge knew in holding himself to be qualified that he could try the case with complete fairness and impartiality as to the parties, but that does not seem to be the test. It has long been held that a stockholder in a corporation is disqualified to sit as a judge in a trial wherein the corporation is a party.

Now, Mr. Chairman, in the same sense I say that the nature of the decision is really not important, as I indicated before, whether it is for or against a corporation or a party. It is irrelevant. The decision as to qualification must be made at the outset of the case, and the courts are unanimous in the feeling that he must disqualify himeslf.

Now, I am not going to burden you with reading more citations, but I am going to refer you to Oakley against Aspin Wall, 3 N.Y. 547, People against Suffolk, Common Pleas 18 Wence 550.

In the matter of Murchison, which is a U.S. Supreme Court case, 349 U.S. 133, decided in 1955, I think because it is a U.S. Supreme Court case it merits some quotation—I won't read too long a quotation:

A fair trial and a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases, but our system of law has always endeavored to even prevent the possibility of unfairness. To this end, no man can be a judge where he has an interest in the outcome.

Let me go over to another subject matter. I think perhaps enough has been said about that in the establishment of that basic precept of of law. We have also examined the records of the Securities and Exchange Commission, and the Department of Labor bearing on the subject matter, and we take this occasion to include such information in the supplemental report and to offer additional comments on the qualifications of the nominee.

Further, I request leave of this committee to include a brief comment on the proceedings to date.

Contrary to the suggestions advanced in the defense of the nominee that his activities as an officer in the Carolina Vend-A-Matic Corp. were limited and that he was generally inactive, Judge Haynsworth's activities in that corporation were beyond stockholder-officer status.

Records at the Security Exchange Commission show that Judge Haynsworth was also a trustee of the corporation's profit-sharing and retirement plan in 1961 and that in 1962 Judge Haynsworth as trustee on behalf of one party and his wife, Dorothy M. Haynsworth, as secretary to the corporation, on behalf of the other party signed an instrument amending the profit-sharing and retirement plan.

As trustee to a retirement plan for Vend-A-Matic's employees and officers, Judge Haynsworth had the affirmative duty to exercise at all times his personal skill and prudence in protecting the interest of the beneficiaries of the trust. I cite an authority on that.

Let me depart from that and say this.

Let me first conclude a paragraph on the first issue. Bogart, Trusts and Trustees, 2d Ed. section 612. Judge Haynsworth as trustee had the obligation to administer the retirement funds committed to his trust which included the obligation to invest the funds entrusted to him. Judge Haynsworth could not avoid responsibility of a trustee by delegating any of his powers to anyone else.

An examination of the Labor Department's records would make it appear that Judge Haynsworth failed to comply with the law imposed on trustees of a retirement fund. In 1959 Congress passed the Welfare and Pensions Disclosure Act, 29 U.S.C. 301 et seq.

To be accurate, I should really say it passed it in 1958, effective January 1, 1959.

Under the provisions of this law the trustees or the administrator of the funds were required among other things to publish a description of the plan and file annually with the Secretary of Labor two copies of the plan and each annual report. We are informed by the Department of Labor, Welfare and Pension Reports that no such filing or disclosure was ever made as required by section 307 of the act.

We make no suggestion that the failure to file was deliberate or willful. That would be a criminal offense, 29 U.S.C. 308. We do suggest however that the corporate undertakings by which a judge assumes the duties imposed upon him by law and the instrument creating his trusteeship, poses potential conflicts which underlie the duty of a judge to desist from any such activities.

Let me depart at this moment to pose this problem. A judge who assumes a trusteeship is in the ambivalent position of having two trusteeships, one as a judge he is a trustee to carry out the law as it is written, and to decide decisions fairly.

The other trusteeship is on behalf of the beneficiaries, and I respectfully suggest that those two trusteeships pose potential conflicts, particularly as in this case, which no judge ought to submit to, particularly when the law imposes, as I described in this case, certain obligations upon the trustee and the administrator of the plan to perform, and it does appear that the trustees failed to perform those obligations.

Now, failing to perform those obligations could expose the trustees to a suit. Each trustee would be liable, I assume for damages, if there are any damages resulting from his failure to comply with the filing requirements.

The filing requirements do say that a plan having 26 or more employees must file. I note that he had a wage and salary volume of more than $400,000, and that Dun and Bradstreet indicates that he had more than 100 employees, so that that would bring him within the meaning of the act.

Now, let me just comment on one other aspect of Judge Haynsworth's testimony that relates to his indulgence in enterprises which are speculative.

He testified, and I refer to page 68 of the transcript, that two of the stockholders, the original stockholders, which dropped out had already incurred loans of $50,000. On the contrary, Judge Haynsworth said that he wrote up loans amounting to $300,000. In other words, he endorsed notes amounting to $300,000 in a case where the original stockholders thought it was too much of a gamble, and they got out.

Now, here is what Judge Haynsworth says about that:

> Judge HAYNSWORTH. Senator, I don't know. I could perhaps from the bank find out the extent to which they were endorsed. I know when the two stockholders dropped out, they got concerned when the amount of those loans passed $50,000. The rest of us were not concerned, and we wanted to go and did go on.
>
> From the financial statements that I have filed—I don't have them in front of me now—these notes got up to approximately $300,000 in 1963, but by that time I also know that we were getting some credit without endorsement. But now—I can't offhand break down the $300,000.

May I respectfully suggest that a judge of the circuit court who becomes an officer of a vending machine operation, with a substantial stockholding, and who at the outset involves himself in $300,000 of notes, is not in my humble judgment complying with the spirit of these canons of ethics, which suggest that a judge ought to stay away from speculative investments.

Now, one other comment about this. The judge indicates in his testimony that there are other loans that they got without putting up any collateral or even endorsements. Now, I don't think it would be an extravagant statement to suggest that in an enterprise of this kind, with these kinds of liabilities, that any bank that would offer substantial credit loans without endorsement or collateral must have some other reasons to do it besides the fact that there is a person requesting the loan, and it is not beyond peradventure of any doubt that one of the elements that the bank considered in making these loans without collateral or even an endorsement is that he may have been the judge of the circuit court of appeals.

Now, in my humble judgment, and I am just one of many lawyers, that is a horrendous situation. It is just impossible to conceive.

Senator ERVIN. You are condemning the judge for speculating. Aren't you speculating now?

Mr. ABRAMSON. No, I am not speculating. I am giving you my judgment.

Senator ERVIN. Yes, you are giving us speculation——

Mr. ABRAMSON. I am giving you my——

Senator ERVIN. You are giving us speculation as to why you think the bank made the loan.

Mr. ABRAMSON. Senator, I am giving you the judgment of a member of the bar of more than 35 years' standing, based on a canon of ethics, and I say it is horrendous that any judge would involve himself in $300,000 worth of liabilities and expose himself to the charge that more loans were given without endorsement or collateral and, Judge, that is a conservative judgment.

Senator ERVIN. You were speculating on a different matter just then. You were speculating on what caused the bankers down in South Carolina, whom you never saw in your life, to make a loan to the judge.

Mr. ABRAMSON. Senator, you have had witness after witness come in before you that offered speculations in the form of a judgment, and I did not hear you wonder whether or not they had a right to so speculate.

I am giving you my judgment as a member of the bar, who has appeared before almost every court of this land, and there isn't one single member of my profession, in my judgment, who would ever disagree with the kind of assessment I gave on this particular transaction, and I am surprised at your disagreeing with it, having been a judge yourself.

Senator ERVIN. I don't know much about banking and I don't speculate about what goes on in a banker's mind.

Mr. ABRAMSON. Well, you are going to do some speculation when you assess these things.

Senator ERVIN. Well, it turned out this was a pretty good loan for the bank to make, because they got the interest on it and they got repayment.

Mr. ABRAMSON. When you pass judgment on this, Senator, you are going to do some speculating, and all I am doing is giving you my speculation on what a terrible thing this thing is, and the kind of ethics that a judge about to wear the robes of the Supreme Court has established, the kind of standards that we see here.

I am shocked.

Senator ERVIN. Well, you were shocked by my action.

Mr. ABRAMSON. Yes, indeed, and I am not easily shocked either. And, incidentally, when a judge permits himself as a trustee to be in the position of having a charge leveled against him that he violated the law, this is not anything that you can pass over very lightly.

Now, I hope that something will be said about that. I just offered my judgment.

Senator ERVIN. Nobody preferred that charge except you. The Labor Department has not, and they are the only one authorized by law.

Mr. ABRAMSON. Senator, the only time the Labor Department would know that there is such a plan is when he files it. It is his failure to file with the Labor Department that constitutes the violation. How would they know if anybody does not file it?

Now, I have annexed, I have set forth my comments about the standards, President Jennings' standards, and this is how he construes his statement.

I annex to this statement a memorandum from our General Counsel in response to my request to comment on the September 5, 1969, letter from William H. Rehnquist, Assistant Attorney General, to Senator Roman L. Hruska, setting forth his views on the conflict-of-

interest issue. It appears from that memorandum that Mr. Rehnquist was unable to cite a single Federal Court case to support his viewpoint while overlooking the recent decision of the U.S. Supreme Court that rejects his views.

As a layman, I would like to comment on the standards to be established by the Judiciary Committee against which an alleged conflict of interest is to be measured in weighing the nomination of a person to be an Associate Justice of the Supreme Court of our land. The committee, I feel confident will apply the highest standards possible and one that must be free from any taint of partisanship.

We respectfully suggest that in establishing those standards each committee member who will judge the nominee must himself be free of any appearance of a conflict of interest or a predetermined bias for or against a nominee.

I respectfully suggest, therefore, that a member of the committee has not met that test if he in fact professionally represented the Darlington Mills before the Supreme Court in the very case that forms the basis for the conflict-of-interest allegations against Judge Haynsworth. The Deering Milliken Corp. at the time of the *Darlington* case was controlled by Roger Milliken, president of the Darlington Mills and by other members of the Milliken family.

I would accordingly urge that any such committee member disqualify himself from passing on the qualification of the nominee. Failing to do so would in a large measure denigrate the standards by which the committee will judge others in the public's eye.

The record suggests that President Nixon could not have known the facts surrounding Judge Haynsworth's judicial record. At least it is inconceivable to me that President Nixon was made aware of the segregationist qualities of Judge Haynsworth's decisions which are a throwback to the pre-Civil War days.

I trust that before the committee acts it might afford the President an opportunity for a second sober judgment on his nominee for membership on the highest court in our land.

Now, Mr. Chairman, I am going to conclude, but not without a couple of comments about a statement that Senator Ervin has continuously made before this committee, and I hope you will forgive me if I get the record straight, because I think those statements have been inaccurate.

I refer, Senator, to your statements made almost daily that Judge Haynsworth decided the *Darlington* case two times out of three in favor of the union. I think I am right in quoting you, Senator.

Senator ERVIN. He certainly did. Yes, sir, you are right on that.

Mr. ABRAMSON. Now let me address myself to that. And you also said that he decided the first case in favor of the union.

Now, Judge, I might say at the outset, if we had more victories like that in the first case, some of the lawyers would have to get out of the law business. I will tell you that.

Now, the first case involved, essentially, a very unusual order of a district judge, which handed down an injunction against the Labor Board from proceeding to undertake a hearing, and it is utterly unheard of that an injunction would issue.

But now, let's see what that injunction said, and let's see what Judge Haynsworth did about that, Senator, and let's see whether it conforms to what you said he did.

I am going to read from the case. I read now from the decision of Deering Milliken, Inc., 295 Fed. 2d 856, on page 860:

"The board again remanded the case for further hearing and testimony on the supplemental question of possible remedies, the remand in broad terms being 'for the purpose of taking newly discovered testimony and evidence relating (1) to the Deering Milliken and Company, Inc., press release referred to in the aforesaid affidavit, and (2) the responsibility of Deering Milliken and Company either for the unfair labor practices of Darlington Manufacturing Company or to remedy those unfair labor practices, and (3) such other further evidence as may be proper and appropriate under the circumstances.' "

The guts of that case, Senator Ervin, was the injunction against the board from going into the liability of Deering Milliken. Judge Haynsworth sustained that injunction. Now, the only thing he said the board can go ahead on is a very pro forma thing to see about the connections between Cartwell and Deering Milliken.

Judge, let me say something more about that. Perhaps this might limit the discussion on this thing. I am going to quote from the brief that you wrote, and see what you said about the what circuit court decided, and see whether it comports with what you are now saying before this committee.

This is your brief. I quote from page 12, brief submitted by Sam J. Ervin, Jr., Morgantown, North Carolina.

Senator ERVIN. For Darlington Manufacturing Co.

Mr. ABRAMSON. Pardon?

Senator ERVIN. For Darlington Manufacturing Co.

Mr. ABRAMSON. For Darlington Manufacturing Co. the president of which is the president of Deering, Milliken Cos. I quote:

"Thereupon, Deering, Milliken brought an action in the United States District Court for the Middle District of North Carolina, in which it asked the Court to restrain the regional director of the board from holding additional proceedings on the ground that they would violate the requirement of section 10(e) of the Administrative Procedure Act that agencies conduct their proceedings without unreasonable delay."

And then you go on, Judge, to say the following:

"The court granted such an injunction which in principal part was affirmed by the court of appeals for the fourth circuit in *Deering, Milliken, Inc.*, v. *Johnson* 295 Fed. 2d, 856, fourth circuit, 1961", which is the case we are talking about, and just to be sure that you were clear, you added the following:

> The court held that the further proceedings contemplated would be a violation of the board's duties to proceed with reasonable dispatch to conclude the proceedings. The court did, however, permit one further limited remand.

Now, here you are telling the United States Supreme Court, in describing that case, which you now describe as a victory for the union, that principally the Court decided for Deering, Milliken. Now, how do you reconcile these two statements?

Senator ERVIN. I can reconcile it very easily.

Mr. ABRAMSON. Yes.

Senator ERVIN. The union came in and said they wanted to get some newly discovered evidence about the merger which had occurred

in 1960 between Deering, Milliken and company, the sales corporation, and the Cotswool Manufacturing Co. They said the merger threw light on the question of the relationship between Darlington and the company.

The Court sustained the point that the National Labor Relations Board had delayed an unreasonable period of time deciding the case, and that was certainly correct, because they had been fooling with it for five years at that time, but the court said that they would allow a remand to let them go into this alleged newly discovered evidence. Also they would allow evidence to show liability of Deering, Milliken for the act of Darlington.

Mr. ABRAMSON. Senator, you could not be more wrong, but let the record speak for itself.

Senator ERVIN. There is not much use for you and myself to discuss the meaning of words.

Mr. ABRAMSON. Let me say this. If Judge Haynsworth's decision really had full sway, there never would have been any decision against Deering Milliken, which now involves itself in a judgment of about $4 or $5 million. Now, let me tell you what else he did in this case. I want to read you a footnote by Judge Haynsworth.

Senator ERVIN. We could spend from now to eternity giving differences of opinions about the interpretation of a decision. You have given your position and I have given mine.

Mr. ABRAMSON. Yes.

Senator ERVIN. And so let's proceed on to something else. After all, if I make an error, my errors are not what amount to anything here. I said that Judge Haynsworth did decide that case in favor of the union, because the injunction issued by the Middle District Court of North Carolina had forbidden any kind of a hearing, and he modified that injunction to allow them to hear about alleged newly discovered evidence.

Mr. ABRAMSON. You haven't listened to my quotation from the opinion.

Senator ERVIN. I did.

Mr. ABRAMSON. And, Judge, you haven't listened to the brief, your own brief that I read to you. Let me cover one other thing that you said about this case, which is not entirely accurate.

You said that the U.S. Supreme Court agreed with the fourtb circuit when it finally decided the case. You could not be more wrong.

Senator ERVIN. I have said this: that case split-up and involved two points. The first was whether or not Darlington's going out of business completely and permanently was an unfair labor practice, if Darlington was a separate corporation.

It went up on that point, because the National Labor Relations Board said it did not make any difference what the relationship was between Darlington and Deering Milliken. They said if Darlington had economic justification for going out of business, and if it were a separate corporation, it had an aboslute right to go out of business completely and permanently for any reason. This point, the one I argued, was sustained by the Supreme Court totally. That was the only point I argued, and the only one I was retained on was that.

The other question was whether the circuit court was wrong in saying, if it was a part of Deering Milliken, whether it could go out of

business partly on account of union bias. The Supreme Court said that the case had to be referred back on the second point, and that was argued by Mr. Stewart Updyke. The Supreme Court held as did the court of appeals in one respect—it said that the case was not yet ripe for an enforcement order, because the National Labor Relations Board had failed to make any findings on the question whether the closing of Darlington, assuming it was a part of the Deering Milliken chain, was closed to chill unionization at the other mills, and whether it had that effect.

But I said that insofar as the Court of Appeals held that the decision of the National Labor Relations Board could not then be enforced, it was in harmony with the Supreme Court decision, which also had that effect.

I have never said that the Supreme Court did not agree with the court of appeals whether if Darlington was a part of the Milliken chain that it could go out of business, or whether an employer could go out of business partly if it was actuated by a motive to chill unionism in other plants it owned.

Now, that is what I said in this case.

Mr. ABRAMSON. I am not going to argue the point, Senator. I don't think people could be less interested in this discussion, perhaps, that you and I are having. But I wanted to set the record straight.

Let me say this about that aspect of the case.

Senator ERVIN. If you don't want to argue with me, why do you argue with me?

Mr. ABRAMSON. I want to set the record straight.

Senator Ervin. We can talk about this for a long, long time.

Mr. ABRAMSON. I will take your advice. I suggest you read, once more, page 268–380 United States and see what the Court really did.

Senator ERVIN. I have already memorized that.

Mr. ABRAMSON. I will bet you have. Thank you very much for your tolerance.

Senator ERVIN. Thank you, sir. It is absurd to suggest I have any conflict of interest in this case. I was employed to argue one point of law before the Supreme Court in behalf of the Darlington Corp. I never had any connection with this case before it reached the Supreme Court. I haven't participated in it since the Supreme Court announced its decision back in March 1965.

The point I argued, the Supreme Court sustained 100 percent. I appeared for Darlington which is now a dead corporation. It is not nominated for the Supreme Court. Roger Milliken is not nominated for the Supreme Court. I never saw Judge Haynsworth until he came here to testify in this case. I do not know him personally.

I assert that the first time this case came before him he decided in favor of the union, and the last time he decided in favor of the union.

I don't know how Darlington or Deering Milliken feel about this case. I have had no communications from them, but they must be opposed to Judge Haynsworth because he decided the case against him twice.

Mr. ABRAMSON. Do you think you have an unbiased opinion about Deering Milliken's involvement in this case, Judge?

Senator Ervin. They are not involved in this case. No.

Mr. ABRAMSON. The *Deering Milliken* case and the conflict of interest around that was the focal point of one of the issues here.

Senator ERVIN. I have no conflict of interest.

Mr. ABRAMSON. Can you give an unbiased opinion on that, Judge?

Senator ERVIN. Yes, sir.

Mr. ABRAMSON. It sure doesn't sound like it.

Senator ERVIN. If I was prejudiced, I would be against Judge Haynsworth for deciding the case against my client. My client lost the case, and Judge Haynsworth was a party to the opinion which lost the case for my client. If I had any bias at all, or any conflict of interest, it would be against Judge Haynsworth.

Mr. ABRAMSON. Will you disclose to the committee how much of a fee you got in that case?

Senator ERVIN. It is none of your business or the committee's business.

Mr. ABRAMSON. I am not saying it is mine. I asked you whether you will disclose it to the committee.

Senator ERVIN. I got a fee for arguing the case. I reported my fee to the only people on earth entitled to know it. That is the Internal Revenue Service, and the North Carolina Department of Revenue and Income Taxes. It is nobody else's business. I did not ask you what fee you were getting, but I hope you got a good one.

Mr. ABRAMSON. Anyway, you did a good job for your client.

Senator ERVIN. Thank you. I won the point I argued.

Mr. ABRAMSON. I doubt that.

(Whereupon, at 6:30 p.m., the committee adjourned, to reconvene at 10:30 a.m., Thursday, September 25, 1969.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

THURSDAY, SEPTEMBER 25, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10:30 a.m., in room 2228, New Senate Office Building, Senator Roman L. Hruska, presiding.

Present: Senators Eastland (chairman), Ervin, Hart, Kennedy, Bayh, Burdick, Tydings, Hruska, Thurmond, Mathias, and Griffin.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

Senator HRUSKA. The committee will come to order.

The chairman has been delayed on official business. He asked me to preside until he arrives.

We are here for the purpose of receiving the testimony of Mr. Joseph Rauh and Mr. Clarence Mitchell.

Mr. Mitchell, I understand you are going to be first because you have a plane to catch, is that right?

TESTIMONY OF CLARENCE MITCHELL, LEGISLATIVE CHAIRMAN, AND JOSEPH L. RAUH, JR., COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. MITCHELL. Thank you, Senator Hruska.

The plan that we would like to follow is I will present a statement which Mr. Wilkins would have made if he had been here.

Senator HRUSKA. Very well.

Mr. MITCHELL. Mr. Rauh will handle the technical legal questions. We are both appearing as representatives of the Leadership Conference on Civil Rights.

The leadership conference is a combination of over 125 different organizations interested in the area of civil rights. Mr. Rauh is counsel, and I am the legislative chairman.

The statement of Mr. Wilkins is as follows:

The nomination of Judge Clement F. Haynsworth, Jr., is a deadly blow to the image of the U.S. Supreme Court.

The Court has long been the symbol of protection of civil rights and human dignity for millions of American Negroes. When the Congress delayed legislation by prolonged committee deliberation and filibusters on the floor of the Senate, the Court has been a rock on which rested the faith that constitutional rights could be vindicated in an orderly resort to lawful remedies.

The landmark decision on school desegregation in 1954 was a dramatic turning point in the history of our Nation. Since 1954, the Congress has passed the great civil rights acts of 1964, 1965, and 1968. Yet, even when the Congress has acted, the role of the Court has continued to be of enormous significance to Negroes because it has struck down attempts to thwart the purpose of these new laws.

Suddenly, the colored citizens of the United States are aware of a threat which may convert the Court into a swamp of delay and technicalities. Judge Haynsworth's much heralded "strict construction" approach is not new to the Negroes of the United States. The so-called strict construction is what produced the spurious separate but equal doctrine. It led to the long battles against segregation in interstate travel. It caused us to exert energy and expend funds to establish the right to vote, and also the right to enjoy an opportunity to purchase a home as well as many other things.

In short, for Negroes the so-called strict construction means granting their constitutional rights with an eye dropper at a time when these rights should be flowing like a river in a thirsty land.

On the civil rights issue, probably the No. 1 domestic concern, since it deals with the treatment of 22 millions of black Americans and with that of several millions more who are nonwhite, Judge Haynsworth, to use a current expression, is not "with it."

The U.S. Supreme Court is not a small claims court. It does not handle day-to-day matters that we commonly associate with courts. It handles appeals dealing with interpretations of the U.S. Constitution. It sets a course for the country. It determines policy for decades and longer. Though it is far away from the average citizen, its decisions affect profoundly his future.

It goes without saying that the Negro American minority which has been fighting its way to all the rights, protections and privileges of constitutional citizenship and which is now in a crucial stage of that crusade, is deeply concerned with the personnel of the Nation's highest court.

On mood, on whether the United States shall press forward to insure equality for its black minority, Judge Haynsworth's dissenting opinions in some key civil rights cases show clearly that he is not for pressing forward.

They reveal that Judge Haynsworth is for the status quo or for inching along. He would not have society move until forced to do so by inescapable requirements of the law and by specific, pinpointed arguments on that law.

For more than half a century the NAACP and other organizations have labored to vindicate rights by taking cases to the highest court in the land. We have always believed that this was the way to accomplish orderly and constructive change. Any further postponement of the enjoyment of established constitutional rights will erode the faith and confidence in the efficacy of our institutions.

Senator Hruska, that completes Mr. Wilkins' statement.

With your permission I just had two other things that I would like to offer for the committee.

One, you may recall that on September 19, Mr. John Bolt Culbertson, a very vocal witness, testified before this committee on behalf of

Judge Haynsworth. Mr. Culbertson is a lawyer in South Carolina, and has at times been associated with the NAACP as well as other civil rights groups.

The burden of Mr. Culbertson's testimony was that Judge Haynsworth would be fair, and I believe Mr. Culbertson attempted to establish his role as an authority in the area of civil rights by indicating his connections with the NAACP.

Therefore, to rebut, for whatever it may be worth, in the committee's record, Mr. Culbertson's statement, I would like to call attention to two things.

Following his testimony, I refreshed my memory in connection with a terrible lynching that occurred in the State of South Carolina in the year 1947. I did so by leafing through the back issues at the Library of Congress of the South Carolina State, and for the committee's convenience, I have made some reference in a little memorandum to the key events in that lynching.

A Negro was seized by some 30 taxi drivers who were also accompanied by two young men, who were, as the South Carolina State indicated, members of wealthy textile families. The victim was taken out, brutally stabbed, beaten, and according to the testimony offered by the prosecution when the case came into court, his head was virtually blown off by a shotgun which had been discharged at close range.

The legal fraternity in South Carolina, according to the newspapers, was not very eager to get involved in that case; but according to the South Carolina State, on May 6, 1947, Mr. Culbertson was one of the lawyers who appeared in defense of the 30 taxi drivers and other persons who were arrested in connection with that crime.

Another interesting thing happened in that case. The defense did not attempt to present legal arguments by offering witnesses and that kind of thing. According to the South Carolina State, the defense resorted to what an editorial said—this was an editorial of May 27 in the South Carolina State:

> The defense presented no testimony and called no witnesses. It rested its case upon arousing sectional resentment and animosity for the Federal Bureau of Investigation as an agency with "meddler's itch." The manner of the Defense can be counted on to set up new targets for criticism and "northern interference."

I suggest, Mr. Chairman, that it would indicate that in that situation Mr. Culbertson certainly was not on the side of the legal principles that the NAACP stands for, and in my judgment we would certainly not call upon him to represent our point of view in a matter of this kind.

In addition I have an affidavit from Mr. Leon Shull, who called Mr. Culberton in connection with this matter, and in that affidavit Mr. Shull says:

> I questioned Culbertson about Haynsworth's public record on civil rights. Culbertson said that Haynsworth had not been publicly involved—he thought because of a speech defect—but he believed firmly that Haynsworth represented the Old South, and was opposed to blacks, integration, and trade unions. There is no question but that Culberton felt Haynsworth's confirmation to the Supreme Court would be disastrous.

With your permission, Mr. Chairman, I would like to offer those to whomever you think I should.

Senator ERVIN. I have no objection to your offering them, but I would suggest that John Bolt Culbertson came here himself and spoke himself just like John Alden was invited to by Priscilla——

Mr. MITCHELL. I am sorry, Senator, I did not hear you.

Senator ERVIN. That affidavit refers to what somebody else thinks that John Bolt Culberton thought.

Mr. MITCHELL. No, what he said.

Senator ERVIN. Well, John Bolt Culberton came here and spoke for himself, and he did not authorize that man to speak for him.

Mr. MITCHELL. No; but before you came in, Senator Ervin, the point I was making is that Mr. Culbertson, a gentleman that I know very well, had come here and attempted to represent himself as a civil rights sympathizer. I believe he also indicated that he was at least on friendly terms with the National Association for the Advancement of Colored People.

It is my understanding that he went even further in that he attempted to discredit the position of our organization in respect to its opposition to Judge Haynsworth, and inferred at least that we did not represent the views of the people of South Carolina.

Well, what I have offered is this affidavit which describes a different point of view, and in addition, just before you came in, I referred to the fact that Mr. Culbertson was the lawyer for some 30 or more persons who were arrested in connection with the very terrible lynching in 1947 in South Carolina.

I mentioned also that the South Carolina State, which as you know is a highly respected newspaper, daily paper, published in Columbia, had editorially indicated that the defense was the kind which we ordinarily associate with appeals to sectional passions.

Having said that, I indicated that because of this Mr. Culberton could certainly not be relied upon as a proper interpreter of the point of view of our organization.

Senator ERVIN. I have always noticed the newspapers profess to know more about cases than the witnesses, the judges and the lawyers and the jurors.

Mr. MITCHELL. I think in this instance, Senator Ervin, Senator Thurmond was then Governor of the State of South Carolina. The thing that interested me, as I looked back in that record, was the fact that from the Governor on down the State was outraged about this lynching.

It was the first that South Carolina had had in a long time. Most lawyers did not want to take the case. But it had been hoped that once those charged were taken into custody the trial would follow the normal legal processes.

However, instead of doing as one might expect in a trial of that kind, the lawyers for the defense made an attack on the Federal Bureau of Investigation because that Bureau had been effective in finding those who were charged; so that the whole appeal was really based on appeals to bias, saying that these northern people were rown there interfering with the rights of the southern people.

And as I indicated before you came in——

Senator ERVIN. I would say this in justification. I do not think the southerners are the only people that are demagogues before jurors.

Mr. MITCHELL. I would certainly agree with that, and I know as I am sure most people know that in certain instances demagoguery before juries can be an effective instrument in freeing those who are guilty. However, lawyers are officers of the court, and they should not in a case where these things are involved bring in sectional things which would inflame prejudices unnecessarily.

The only reason it is relevant——

Senator ERVIN. I do not think the judge ought to permit it.

Mr. MITCHELL. Well, that is true.

Senator ERVIN. But I have defended a good many men that were charged with very serious crimes. It is clear that all people who are charged are not guilty. So I hope you don't mean to imply that these men did not deserve counsel, no matter how unpopular they were?

Mr. MITCHELL. I hope we would all recognize that principle, but I would say in this situation my whole point is that Mr. Culbertson has come in here as a converted advocate of civil rights and, in the jargon of the old-time religious people who went around conducting revivals, I think his testimony for Judge Haynsworth would indicate that the conversion was not complete; that maybe he has to hit the sawdust trail again in order to be completely on the side of what is constructive.

(The memorandum and affidavit referred to for inclusion in the record follow:)

MEMORANDUM

On Friday, September 19, 1969, Mr. John Bolt Culbertson, Attorney at Law from Greenville, South Carolina, testified as a witness for Judge Clement F. Haynsworth. At the same time, Mr. Culbertson identified himself as a supporter of the NAACP. This is the second time Mr. Culbertson has been on the other side in a matter involving a major civil rights question.

The first time was in 1947. Mr. Culbertson was listed in the May 6, 1947, issue of the *South Carolina State* as one of the lawyers defending approximately 30 persons, most of them taxi drivers, who were charged with committing murder in conection with the brutal lynching of a Negro whose name was Willie Earl. Other lawyers in the case were Benjamin A. Holt, P. Bradley Morrha, Jr., and Thomas A. Wofford.

The lynching occurred on February 18, 1947. The prosecution charged that the victim was stabbed, beaten, and shot in the head at close range with a shotgun. The State of South Carolina expressed shock at this incident and called for the apprehension and prosecution of those who perpetrated the crime.

After the defendants were brought to trial, evidence was developed indicating that the FBI had assisted in obtaining evidence. At the close of the State's case, the Defense did not present any testimony. The *South Carolina State* for May 22, 1947, carried a news story stating:

"The Defense has rested its case without offering witnesses to present testimony. Instead, Defense Counsel assailed 'northern interference' and charged federal agents with having 'meddler's itch.'

"In closing the Defense argument yesterday, Attorney Thomas Wofford shouted: 'There is no cure for it, except a verdict by a jury of this kind—to acquit these boys and show them it's no use meddling in Greenville County.'"

All of the defendants were acquitted. There was a wave of shock throughout the Nation.

In an editorial on May 23, 1947, the *State* said:

"The Defense presented no testimony and called no witnesses. It rested its case upon arousing sectional resentment and animosity for the Federal Bureau of Investigation as an agency with 'meddler's itch' . . . The manner of the Defense can be counted on to set up new targets for criticism and 'northern interference.'"

With that background, it is unlikely that Mr. Culbertson could be expected to have the same standards for Federal judges that the NAACP asserts it is necessary to have if all citizens are to have equal treatment in the courts of our Nation.

AFFIDAVIT

Leon Shull, being duly sworn, deposes and says:

1. I am the National Director of Americans for Democratic Action.

2. The officers and national executive committee of the Americans for Democratic Action have taken action to oppose the confirmation of Judge Clement F. Haynsworth, Jr. to the Supreme Court. Based on my discussions around the country, I believe the vast bulk of the ADA membership with rare unanimity opposes confirmation of Judge Haynsworth.

3. In carrying out my responsibilities as National Director of an organization opposing Judge Haynsworth, I telephoned John Bolt Culbertson, a member of ADA in Greenville, South Carolina, on or about August 20, 1969, to see what additional information I could obtain concerning Judge Haynsworth. As soon as I explained the purpose of my call, Culbertson responded without hesitation that Judge Haynsworth was anti-civil rights, anti-labor, and representative of the reactionary establishment of South Carolina. He said that Haynsworth's law firm was the law firm for any corporation that wanted to do business in South Carolina. He said that while Haynsworth would not get his own hands dirty, it was his law firm that determined policy and strategy.

4. I questioned Culbertson about Haynsworth's public record on civil rights. Culbertson said that Haynsworth had not been publicly involved—he thought because of a speech defect—but that he believed firmly that Haynsworth represented the old South and was opposed to blacks, integration, and trade unions. There is no question but that Culbertson felt Haynsworth's confirmation to the Supreme Court would be disastrous.

5. He was enthusiastic about ADA's determination to oppose the Haynsworth nomination. He suggested that I phone others to get more information. Culbertson's whole response was of opposition to the Haynsworth nomination.

LEON SHULL.

Subscribed and sworn to before me this 17th day of September, 1969.

[SEAL] CLARA IGHNAT, *Notary Public.*

My Commission expires March 14, 1970.

Senator ERVIN. You may proceed.

Senator HRUSKA. I have no questions.

The chairman asked me to take charge until you arrived, Senator Ervin. Now you have arrived and you are chairing.

Senator ERVIN. Do you have further testimony?

Mr. MITCHELL. May I explain, Senator Ervin, what is taking place. I came in to present Mr. Wilkins' testimony. I have completed that. Mr. Rauh is to present the legal side of our argument in these matters, and if the committee has no further questions from me, Mr. Rauh will begin.

Senator ERVIN. Will you proceed, Mr. Rauh, unless Senator Kennedy has some questions.

Senator KENNEDY. No. I think if we could, Mr. Chairman, feel free, in the course of Mr. Rauh's comments, to question him, as well as Mr. Mitchell, on the points that are raised, I think that will be fine.

Mr. Chairman, there are a number of people who are outside. I see some empty seats over there. Is it possible that——

Senator ERVIN. I am sure the officer will admit anybody outside who wants to get in as long as seats are available. In fact, if I were the officers I would admit those if there is standing room available.

Senator KENNEDY. As I understand it, the Justice Department witnesses are not coming today. Can anyone from the Justice Department indicate whether those seats will be taken?

VOICE FROM THE FLOOR. Senator, these seats will not be taken by the Justice Department.

Senator KENNEDY. Will not be taken by the Justice Department? Thank you very much.

Senator ERVIN. Mr. Rauh, you may proceed.

Mr. RAUH. Thank you, Mr. Chairman.

I hope the Senate Judiciary Committee will excuse a certain depth of feeling on my part. This seat on the Supreme Court was formerly held by Justice Benjamin Cardozo and Justice Felix Frankfurter. My first service in Washington was as their law clerk. They were two of the greatest Americans that have ever lived.

Justice Cardozo came as close to being saintly as any human being I have ever had the privilege of knowing.

This is not in any way in derogation of all of the other great men who have held this seat, but those two served as among the greatest judges of our history. It was my good fortune to be able to know and work for them.

Secondly, in speaking of my depth of feeling here, this is the first time since the Supreme Court of the United States outlawed segregation that we have the appointment of a man to a post on the Supreme Court whose belief in that principle, whose belief in integration, is in question.

That brings me to a point that Senators Hart and Kennedy were dealing with when Judge Haynsworth was on the stand. They were trying to get him to express his philosophy, and with not a great deal of success.

You see that if Judge Haynsworth had come out and said, "I do not believe in the *Brown* case, I do not believe in speeding up integration, I believe in slowing it down, I believe in doing everything possible to limit the *Brown* case," he could not be confirmed.

What I believe was troubling Senators Hart and Kennedy was whether you can look at the opinions of Judge Haynsworth to determine whether that is in fact his philosophy, and I think they both were evidencing some reluctance to look at particular opinions to determine Judge Haynsworth's qualification for the Court.

The way we in the Leadership Conference on Civil Rights feel about it is that we would be up here opposing this nomination if Judge Haynsworth had publicly declared what we believe his opinions show, and therefore we believe the only method for determining Judge Haynsworth's philosophy is out of those opinions, and it is that that I propose to show this morning.

I propose to show that Judge Haynsworth's opinions are the opinions of a man who seeks to limit the *Brown* case, who seeks to slow down integration, who seeks to hang on to segregated ways as long as he can, and who on that definition, which I am suggesting, is in fact a segregationist.

I believe that if Judge Haynsworth had said to this committee, "I am a segregationist" on my definition, he could not be confirmed, and on the basis of the opinions I believe I can show that, and he should not be confirmed.

Now, I am not going back to old cases. I want to make that perfectly clear. Judge Haynsworth said, when he was asked about his civil rights opinions, and I quote:

"They are condemning opinions written when none of us was writing as we are now."

The opinions to which I would like to refer are opinions from 1962 to 1968. They do not go back to the early post-*Brown* period. They run for the most recent period.

I would just like, therefore, if I may, to run through the cases which I believe show that Judge Haynsworth's attitude toward integration and segregation is as I suggest.

Possibly one would say that one or two of such opinions might be aberrations. I do not believe that all these could be so described.

The first case is *Simkins* v. *Moses H. Cone Memorial Hospital* in 323 Fed. 2d 959. This was the case of a hospital receiving Hill-Burton aid and discriminating against Negro physicians, Negro dentists, and Negro patients. Indeed in the application which was made by the hospital, it states:

> Certain persons in the area will be denied admission to the proposed facilities as patients because of race, creed, or color.

This was not some hidden policy of the hospital. This was an announced and determined position that no Negro could serve on the staff or be served by the staff.

The majority of the Court in an opinion by Chief Judge Sobeloff held that a Hill-Burton hospital had to admit everyone without regard to race, and had to admit them both to the hospital facilities and to the hospital staff.

Judge Haynesworth dissented. He wrote a dissent, in which he said that there was no State action in connection with the hospital sufficient to require it to be fair to Negroes.

One might have forgiven such an opinion 20 years earlier, or conceivably even more recently, but an opinion had come down just a year or two before from the Supreme Court which left no doubt as to the Supreme Court's views of this type of action, and left no doubt that Chief Judge Sobeloff was correct for the majority.

Senator BAYH. Excuse me, Mr. Rauh, could you repeat the date of that particular case?

Mr. RAUH. Yes, Senator Bayh. The date of this case is November 1, 1963, the decision. The *Wilmington Parking* case, to which I refer, that is the case I was referring to, I had not named it yet, came down in 1961.

Senator ERVIN. If you will pardon me I think it would be helpful at this time, so as to get in the proper context, if you would give us the date of the application from which you read?

Hr. RAUH. Just a second, your honor, I will try to find it. If your honor has it I am certainly willing to accept it. I am working here from Judge Sobeloff's opinion. I will see if I can find it.

Senator ERVIN. You need not delay too long. That can be supplied later.

Mr. RAUH. At page 962, Judge Sobeloff refers to the hospital application. I cannot quickly find the date of it. I will certainly supply it, the date of the hospital application, sir.

Senator ERVIN. The reason I asked is because a large part of the funds came from Moses H. Cone and the State, and Moses H. Cone was dead for a long time before that case had been decided, and the hospital had been in existence for a long long time.

Mr. RAUH. Sir, I am not referring to the hospital charter, I want to make that clear. This was the application for Hill-Burton aid to

which I referred, and it may be in the opinion, but it is not readily available to me. I will see if I can find it and I will certainly supply it for the record.

Mr. RAUH. In 1961 the Supreme Court decided the *Wilmington Parking* case, and that was the case where the lessee of a restaurant was held to governmental standards of fairness, even though it was a private restaurant, privately operated. What did the Supreme Court say there?

They said that there was State action because a State building rented them the property—just like anybody else is rented property.

The Supreme Court said there that the State action doctrine applies wherever "to some significant extent the State in any of its manifestations has been found to have become involved in it."

Now Judge Sobeloff, when he came to the Moses Cone Hospital, with its Hill-Burton aid, said, "This case is controlled by *Burton* v. *Wilmington Parking*," and I respectfully suggest to the committee that it was what we lawyers talk about as an a fortiori case.

Wilmington Parking, where you had only the normal landlord tenant relationship between the State and the restaurateur, obviously went farther than to say that a Hill-Burton assisted hospital had to be fair to Negroes.

A judge, and here one has to try to go to the mind of the judge who wrote this, a judge who tried to distinguish Wilmington Parking from Moses H. Cone Hospital was looking for a way to obstruct integration in that hospital. There is no rational distinction.

Wilmington Parking was a harder case. This case should have just been handled, as Judge Sobeloff did, this case was simply controlled by Wilmington Parking and that should have been the end of it.

This case was not reviewed by the U.S. Supreme Court, of course, because the majority had taken the liberal, pro-integration position, but another case came before the fourth circuit a year later, *Eaton* v. *Grubbs*, 329 F. 2d 710. That is 1964.

You would have though that by that time everyone would accept the trend of the Supreme Court's opinions that State action comes from any significant aspect of State involvement. Despite that, in a concurring opinion in the *Eaton* case Judge Haynsworth said, "I am still unpersuaded" that Simkins is wrong.

In essence he is saying, "I can do nothing about it. I concur in it here, but I am still unpersuaded that the Moses H. Cone Memorial Hospital should under Wilmington Parking have Negroes on its staff."

Senator ERVIN. I do not believe you gave the title of that case.

Mr. RAUH. Yes, Judge Ervin. It is *Eaton* vs. *Grubbs*.

Senator ERVIN. What is the citation?

Mr. RAUH. 329 F. 2d 710. That is 1964, sir.

Coming not to *Dillard* v. *Charlottesville*, 308 F. 2d 920, that is in 1962, I guess that is the oldest of the cases. That is the farthest back of any case to which I shall refer this morning.

Senator ERVIN. I do not like to interrupt you. I wish you would give the citations.

Mr. RAUH. Excuse me, sir; that is 308 F. 2d 920, 1962.

Senator ERVIN. Thank you.

Mr. RAUH. Charlottesville was trying to bang on to segregation as best it could, and it adopted a plan whereby the racial minority could

get out of any school where they were the minority. In other words, if you had a Negro majority in the school, every white person had the right to transfer. If you had a white majority, every Negro had the right to transfer. But that latter was not the transferring that was going on.

What you had was the right of any white student to transfer out of any school with a Negro majority, no matter how close it was to him, no matter whether it was next door to his house, that white person could transfer out of that school if it had a majority of Negroes, and go to a school where there were a majority or possibly only whites.

Now, here again the majority of the court decided that obviously illegal plan was just that. Judge Haynsworth dissented. He said he was with the minority. I do not have that opinion in front of me, but that was Judge Haynsworth who wrote that opinion again, saying that desegregation was a "searing experience," those two words are his, and that he was not going to say that a school board could not set up a rule that frustrated integration by allowing transfer out.

This case did not go to the Supreme Court because in this case the majority of the court of appeals favored the integration side, and certiorari was denied by the Supreme Court. But an identical case went to the Supreme Court. *Goss* v. *Board of Education*, 373 U.S. 683.

There a unanimous Supreme Court took the position of the majority in the Charlottesville case, and rebuffed the dissenting opinion of Judge Haynsworth.

Senator BAYH. Mr. Rauh, the date on that?

Mr. RAUH. The date on the Charlottesville case is 1962.

Senator BAYH. 1962. *Goss* is not a case in which Judge Haynsworth sat?

Mr. RAUH. No, sir. What happened there was that you see, since Judge Haynsworth dissented, the Supreme Court denied certiorari because the majority had upheld the integration side of the matter. They refused to review the case. The identical case came up from Tennessee in *Goss* v. *Board of Education*, and there the Supreme Court unanimously said that a Tennessee school plan identical with the Charlottesville plan was unconstitutional, and it could not be anything else. That is the real point I would like to make here.

There was not any question that that was bad under *Brown*. Listen to what the Supreme Court——

Senator BURDICK. What was the date of *Goss*?

Mr. RAUH. I do not have that, sir. It must be 1963. I will guess it is 1963, and I think Senator Hart is indicating I am right, that it is 1963. What the Supreme Court says in *Goss*, and this is a quote:

> The transfer plans being based solely on racial factors which under their terms inevitably lead towards segregation of the students by race, we conclude that they run counter to the admonition of Brown. Classifications based on race for purposes of transfers between public schools as here violate the equal protection clause of the 14th Amendment.

What is important here is the fact that it was almost impossible to be wrong there. In other words, anybody sympathetic to *Brown* could only have reached the decision that the Supreme Court did in *Goss*, and that the majority did in *Charlottesville*.

The whole principle of *Brown* is that you cannot use racial factors. What is more obvious than saying that you are using racial factors

when you say that a school board can provide that race is a basis for transfer?

In other words, trying to analyze what Judge Haynsworth is doing there, one can only say that Judge Haynsworth was trying to find a way around *Brown*. Now, it is true that he lost nine to nothing with his way around *Brown*, but it was still an effort to find a way around *Brown*, because *Brown* so obviously said you cannot consider racial factors, and Judge Haynsworth upheld a school board which was doing precisely and exactly that, considering racial factors.

The Supreme Court language is exactly as I say, but anybody fairly construing *Brown* would have said that that is what *Brown* meant in this transfer situation. A law school student being given that question could not have come out anyway except that *Brown* governed *Charlotesville* just like *Wilmington Parking* governs *Moses Cone Hospital*.

The next case I would like to refer to is *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (1963). I guess if there is one thing that Judge Haynsworth did that more than anything else infuriates the civil rights movement, I would say it is *Griffin*.

I have shown that in these other cases you had controlling decisions of the Supreme Court which he was resisting. This is equally true in *Griffin*, but *Griffin* is so shocking on its facts as to warrant careful consideration.

That was Prince Edward County. The school suits that resulted in *Brown* came from four different places. One was Prince Edward County, Va. Its suit was brought in 1951, and along with the other three was decided in *Brown* in 1954.

Prince Edward County, however, is not easily persuaded when it came to integration, and they first adopted a plan that would not have created integration for 10 years, and then finally when that was knocked out in 1959, they closed their schools. They did not just close their schools. That would have been bad enough it seems to me, and I would contend for the proposition that that alone is unconstitutional. But they did not alone close their schools.

They helped the white private schools. They gave State and county tuition grants to children going to the white private schools. Oh, yes; they would have given grants to the Negro children too, but they would have given them to go to all-black schools, and one has to say for the wonderful Negro community of Prince Edward County that they did not bite for any such ugly segregationist bait, because what they were being offered were private segregated schools.

The way the county was working this, with State aid, was to close all public schools, help private schools, offering grants to both sides, but knowing that the blacks cannot take them, and then aiding the white private schools with tuition grants and with tax credits. You got as much as a quarter of your property tax off if you contributed to one of the private white schools.

Now, the suit that was started in 1951 was amended to cover the new situation. Here are children, here are the parents of children who started in 1951 to try to integrate the schools for their children, who won a total victory.

That is not quite correct—who won a principle victory in 1954, who now in 1963, 8 years later, having nothing.

Now this case came before the U.S. Court of Appeals for the Fourth Circuit, the amended original *Griffin* case.

Senator GRIFFIN. Mr. Rauh, I do not like to interrupt you, but the way you have been hammering away on the *Griffin* case, I am a little uneasy sitting here. It could not have been any of my relatives down there. Was Mr. Griffin on the side of Brown or against Brown?

Mr. RAUH. He is on the side of the angels, your Honor.

Senator GRIFFIN. Thank goodness.

Mr. RAUH. Griffin is the plaintiff.

Senator GRIFFIN. That makes me feel much better.

Mr. RAUH. Coming back, sir, to the situation in 1963, the plaintiffs with their amended complaint are asking the Court of Appeals to say that the closed schools, with the tax credit and the tuition grant to the private schools, are unconstitutional.

One would have thought, as Judge Bell made clear in his dissent, that there could be no question about the result. To take up Judge Bell's dissent first, he referred to the inordinate delays, the outrageous dilatory tactics, the defiant response to the decision of the Supreme Court in *Brown*, and concluded this way:

It is tragic that since 1959—

That is when the schools were closed—

it is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delays. In the scales of justice the doctrine of abstention should not weigh heavily against the rights of these children.

Now, to come to the majority opinion which Judge Haynsworth wrote. Judge Haynsworth wrote an opinion saying:

I am going to wait until the courts of Virginia decide the question of State law as to whether you have a state-controlled system of public education.

Now before I analyze the weakness of that, I would like to point out something to the committee. This case was argued on January 9, 1963. It was decided on August 12, 1963, a delay of 7 months while children had no public schools, and a delay on a principle that dissenting Judge Bell made perfectly clear was of no validity.

Now why would anyone, in the spring of 1963, want to wait to hear what the courts of Virginia had to say about the facts of this case? Schools were open everywhere else in Virginia. They were open in every other county, but in this county they were closed, and they were getting help from the State.

Indeed, Judge Haynsworth admits in his opinion that the Virginia constitution squarely requires the State of Virginia to run the schools. Even if it did not, it was party to helping the private schools through the tuition grants. How could anybody in 1963 have thought that the facts of this case required any further Virginia clarification?

Well, nobody on the Supreme Court did. The Supreme Court did a very unusual thing: it expedited the process of review. Let me say again that it did this against the background of Judge Haynsworth waiting 7 months while Prince Edward County wallowed in no public schools, but this is what the Supreme Court said when it granted certiorari:

In view of the long delay in the case since our decision in the Brown case, and the importance of the questions presented, we grant certiorari and put the case down for argument March 30, 1964 on the merits, as we have done in other comparable situations without waiting for final action by the Court of Appeals.

Now, what the Supreme Court meant when it said it was not waiting for final action is this: Judge Haynsworth purported to say he was not deciding the merits, he was only waiting for Virginia. He was only having the Federal court abstain until Virginia acted, but the Supreme Court said, in a very unusual action, we expedite this, we put it down for hearing right away, and we are not going to ask the court of appeals what it thinks about the merits of this. We are going to decide it. And that is exactly what the Supreme Court did.

First there were some procedural points it dealt with. Then the Court said:

We agree with the dissenting judge that this is not a case for abstention. In the first place the Supreme Court of Virginia has already passed upon the State law with respect to all the issues here.

That is going to be a point by the other side and I want to answer that. While the case was going from the court of appeals to the Supreme Court, the Supreme Court of Virginia did act, but here is what the U.S. Supreme Court goes on to say:

Bnt qnite independently of this, we hold that the issues here imperatively call for decision now.

Think how far the Supreme Court is going there to rebuke Judge Haynsworth. They could simply have said, Well, the Supreme Court of Virginia has acted in the meantime, but they did not. They said "quite independently of this we hold that the issues here imperatively call for decision now." The case has been delayed since 1951—

Now we are in 1964 in the Supreme Court—

the case has been delayed since 1951 by resistance at the State and county level, by legislation and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown* v. *Board of Education* have been denied Prince Edward County Negro children. We accordingly reverse the Court of Appeals judgment remanding the case to the district court for abstention, and we proceed to the merits.

That is the end of the quote, but what they are saying is, we proceed to the merits without asking the court below what they think, which is a very, very unusual action.

On the merits all nine judges agreed that Virginia was illegally closing the schools. There were two judges, Justice Clark and Harlan, who simply disagreed on the question whether the Federal courts are empowered to order the reopening of the public schools in Prince Edward County.

In other words, seven judges concurred in an opinion that the Federal courts should direct the reopening of the public schools. All nine concurred in the opinion that you had to stop the aid to the private schools. Now presumably stopping the aid to private schools will reopen the public schools so, in effect, all nine justices agreed on a course of action which would reopen the public schools of Prince Edward County. Seven of them did it directly, two felt that you simply

keep the State from helping the private schools and you will get the public schools that way.

I would say that the latter was a kind of a decision that they would like to do a little less through orders and a little more through the normal course of events.

Now, compare the fact that seven judges there ordered Prince Edward County to reopen its public schools with this paragraph of Judge Haynsworth's opinion:

> The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often-repeated statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the 14th amendment. Similarly, when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

That runs not noly against the Supreme Court decision in *Griffin*, but it runs against the decision in *Brown*.

Judge Haynesworth appears always to be running away from *Brown*.

In the initial *Brown* decision there is a decree in this very case. This is not a situation where there is a new decree. The initial decree, as Judge Bell held in the dissent, was violated. When you close the schools to avoid a decree of desegregation you are violating the initial decree, as Judge Bell held.

There were several ways Judge Haynsworth could have reached the opposite result and should have reached it.

He could have reached it under the original decree that you could not close the schools to get around the original decision in Brown, and Brown covered this case.

Second, that they could not use State aid like tuition grants and tax credits while they had private schools.

Thirdly, that you could not run public schools in every county of Virginia except one.

And fourthly, that you could not close down public schools anyway because it is a violation of equal protection of the poor.

There were four things compelling Judge Haynsworth, and yet he followed the abstention doctrine to wait 7 months to say he would not do anything about it.

The next case, Mr. Chairman, is *Bradley* v. *School Board of Richmond*, 345 Fed. 2d 310, and there is a companion case, I believe, at 325.

Senator ERVIN. Will you repeat that.

Mr. RAUH. 345 Fed. 2d 310, which was reversed by the Supreme Court.

I will give that citation at the same time, 382 U.S. 103. The Supreme Court decision was in 1965. I presume that the Federal one is either in 1964 or 1965.

Senator BAYH. The one in which Judge Haynsworth participated?

Mr. RAUH. Judge Haynsworth wrote *Bradley*; yes sir. Judge Haynsworth wrote *Bradley*. I think I will have to look back, but I believe so

far everything, Senator Bayh, has had Judge Haynsworth's imprimatur on it. *Moses Cone Hospital* was a dissent of his, *Eaton* was a concurrence of his, *Charlottesville* was a dissent of his, *Griffin* was a majority opinion of his. All four of those were his, and *Bradley* is his, too.

Senator KENNEDY. Can I ask, Mr. Rauh, in the *Griffin* case, how do you respond to the point, as I think it has been argued in explanation of Judge Haynsworth's decision in that case, that he wanted the Virginia Supreme Court to make a determination in the first instance, and that this was really the basis for his dissent, and that before the U.S. Supreme Court in fact made its determination, the Virginia Supreme Court had actually made its ruling? Could you just comment on that?

Mr. RAUH. Yes, Senator Kennedy.

In the first place and primarily there was nothing for the Supreme Court of Virginia to decide, because whatever its decision would have been, and whatever its decision was—as a matter of fact I think the Supreme Court of Virginia actually did not hold anything that would be helpful in the integration side of the thing—the Supreme Court went ahead and nine judges said that the action of Prince Edward County was wrong. But the main point I would make is what Justice Black said here. He went out of his way to criticize the abstention, because he said, Senator Kennedy, that the Supreme Court had made its decision in the interim.

He noted that. But then he said, "But quite independently of this we hold that the issues here imperatively call for decision now."

In other words, he seems to be saying that regardless of whether Virginia acted, you have to decide it now, and then he went on to make his statement that the case has been delayed too long.

He was critical as Bell in the dissent had been of waiting for Virginia.

Now, remember that the abstention doctrine, Senator Kennedy, is a policy doctrine. It is not like exhaustion of administrative remedies where if you have to do it you have to do it and God help you if you try to go to court without doing it: but this is a doctrine of policy between courts. It is done sometimes on the basis of these factors.

When the State court's decision may be determinative, when there is a clear question of State law, and when there is no urgency in reaching a result, you might very well have abstention. But where there is no real need for the State court's decision, where it can be decided without the State court's decision, where there is an urgency in Federal action, you do not apply the doctrine of abstention.

That is exactly what it seems to me the Supreme Court, nine to nothing, is saying on that point. It was a coincidence that the case was decided in the interim. It was not at all determinative.

Senator KENNEDY. Thank you.

Mr. RAUH. Returning now to *Bradley* in 345 F. 2d 310, which I believe is 1964, which I know is either 1964 or 1963, there the Supreme Court again did an unusual thing. After the decision of Judge Haynsworth remanding the case to the district court, a petition for certiorari was filed. The Supreme Court did not even hear argument. It just issued a per curiam opinion unanimously reversing the Haynsworth decision.

Senator ERVIN. If you will pardon me they sometimes do that too fast. When I was on the supreme court in North Carolina we had two cases go up to the Supreme Court, one involving some riots in connection with a strike in Winston-Salem. Some of the defendants in each case were white and some were colored.

The Supreme Court in two per curiam decisions affirmed the judgment in one case and reversed in the other regarding whether the juries had been improperly constituted. The facts in both cases were exactly the same, but the Supreme Court did not take enough trouble to find out what the facts were, and reversed one and affirmed the other.

So there have always been two judges I have always been scared of—one is "Judge Per Curiam" and the other is "Judge Expediency."

Mr. RAUH. This was a unanimous per curiam opinion.

Senator ERVIN. That makes it worse as a rule because it shows none of them looked into it.

Mr. RAUH. What was at stake there, Senator Ervin, was the faculty allocation part of the Richmond and Hopewell, *Virginia School Board* decisions. They had left the faculty allocation on a totally racial basis. When Judge Haynsworth sent the matter back to the district court, he made no reference to the fact that there should be full hearings on the question of the racial aspects of faculty allocation. The Supreme Court, as I said, reversed unanimously without argument with the following language:

> There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reason for postponing these hearings. . . . These suits had been pending for several years. More than a decade has passed since we directed desegregation of public school facilities with all deliberate speed. . . . Delays in desegregating school systems are no longer tolerable.

With those words they told Judge Haynsworth unanimously that he had been wrong in *Bradley*.

Now, coming to the freedom-of-choice problem, and here again, Senator Bayh, it is Judge Haynsworth's opinion to which I shall address myself, so I guess I could say that in all the seven cases on which I shall rely this morning: the are all either majority, dissenting or concurring statements by Judge Haynsworth.

I had not even thought that through when I got up but your question helped me. I do believe that there is no guilt by association here. These are all Judge Haynsworth's cases. In that respect we may have certain differences with his anti-labor record. I heard Mr. Harris' brilliant testimony on the labor cases but he was working with concurrences a good deal of the time.

That does not appear to be true in the cases that we are relying on here.

Coming to freedom of choice, that of course has been a much discussed subject, and it too went to the Supreme Court, but I would like to straighten out the record because there has been some confusion.

There are two cases that Judge Haynsworth decided together, that his court decided together. The first is *Bowman* v. *County School Board of Charles City County, Va.*, 382 F. 2d 326, and this is coming awfully

close now. This is 1967. And the companion case, *Green* v. *County School Board of New Kent County, Va.*, which is 382 Fed. 2d. 338. I just want to get this clear.

Senator ERVIN. 308 or 338?

Mr. RAUH. 338.

Senator BAYH. Also a 1967 case?

Mr. RAUH. Yes, sir; they are right together in the reports. But what I would like to clarify is that Green went to the Supreme Court and Bowman did not. All that Green says in the Fourth Circuit is:

> The questions presented in this case are substantially the same as those we have considered and decided today in *Bowman* v. *County School Board of Charles City County*. For the reasons there stated, the rulings of the district court merit our substantial approval—

And so forth.

In other words, there is no *Green* opinion below. The opinion below is in *Bowman*, and *Green* went along with it. The opinion in the Supreme Court is in *Green*.

Now let us look at *Bowman*. *Bowman* was a freedom of choice case, and a faulty allocation case, in which Judge Haynsworth upheld freedom of choice and the proposal there on faculty allocation. Judge Sobeloff followed what they do in the Fourth Circuit, euphemistically calling a dissent a concurring opinion. What it says in the reports is "Sobeloff, with whom Winter joins, concurring specially."

I intend to show you it was in effect a special dissent, but I do not have to rely on my own judgment on that. The Supreme Court so treated it, but since I have said that it was a dissent, I would like to refer now to where the Supreme Court says that. Yes, the Supreme Court in *Green*, when it comes to consider the case, now we are up to 1968, in the Supreme Court case in *Green*, that is the case that knocks out the freedom of choice, that is the appeal from the *Bowman-Green* case, the Supreme Court said:

"Judges Sobeloff and Winter concurred with the remand on the teacher issue but otherwise disagreed."

In other words, the Supreme Court at least could see that "concurring specially" meant disagreement—even if a letter written by some pro-Haynsworth law clerks couldn't see the point, the Supreme Court did.

At any rate, Judge Sobeloff's dissent—excuse me, I did not mean to say that—Judge Sobeloff's special concurrence just lights into freedom of choice. He agreed that the case had to go back to the district court, but he wanted the district court to get periodic reports on how freedom of choice was working for the very reason that he feared it would work as the Supreme Court ultimately said it was—as continuing segregation. The opinion of Judge Sobeloff states our side of freedom of choice better than anything. In fact, the Supreme Court thought it was so good they quoted from him:

> "Freedom of choice" is not a sacred talisman—

Said Judge Sobeloff—

> it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If they prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials (have the continuing duty) to take whatever action may be necessary to create a unitary non-racial system.

Now, Judge Haynsworth's freedom-of-choice case gets to the Supreme Court. That is last year.

Senator HRUSKA. Mr. Chairman, would the witness yield?

Mr. RAUH. Oh, certainly.

Senator HRUSKA. Would it be in order to ask the witness how much more time he wants to consume, because we have a list of witnesses here. If there will be a possibility of determining the time he will take, we can dismiss the other witnesses or we can tell them to come back at 2:30 or make some other arrangements. I notice, Mr. Chairman, that the statement prepared and filed by the witness pursuant to the rules in the Reorganization Act contains five typewritten pages. He has now been testifying for about an hour, most of which time has been by interpolation and reference to casebooks. Within a reasonable period of time that is sufferable or enjoyable as the case may be, but I do feel that it would be well for the purpose of scheduling witnesses and the work of this committee that we get some indication from the witness at this time if it is in order, Mr. Chairman.

Mr. RAUH. I will be happy to answer, Senator Ervin. I have been trying to analyze the cases. I thought it would be more helpful to do that than to read. Everybody goes to sleep when you read, and analyzing cases seemed more appropriate. I think I could finish in 15 or 20 minutes.

Of course, I do not say anything about the questions, because I am not responsible for them, but I think I could finish my direct presentation in 15 or 20 minutes, sir.

Senator HRUSKA. That is helpful. That is very helpful.

Mr. MITCHELL. I would like to say, too, Mr. Chairman, that in fairness to Mr. Rauh, I think the record should indicate that he has been here before ready to testify, but has been unable to do so, that he came back from an out-of-town engagement just to be here, at the committee's pleasure, so it is not his intention to delay.

Senator HRUSKA. I am sure it is not, and I think the time consumed has been very reasonable, but we have our problems too. This is not the only matter pending before the Senate, nor before this Judiciary Committee, strange to say.

Mr. MITCHELL. It is not strange to me, Senator Hruska. I would simply say that this may be a thing which has an important impact on the course of history in this country, and it may very well be that you cannot spend too much time in considering it.

Senator HRUSKA. Oh, yes, too much time can be consumed.

Senator HART. Mr. Chairman, this committee in its consideration of earlier Supreme Court nominees leads me to suggest that we are moving very expeditiously.

Senator HRUSKA. I did not indicate nor do I now intimate that we are not, and the witness is cooperating, but I think my inquiry was still in order.

Senator HART. It is. It does enable witnesses and committee members to plan, and whether it is enjoyable or sufferable, I think it is informative and helpful.

Senator ERVIN. Yes, and I think we should be very particular in explaining what the *Green* case holds. I have read it 25 times and I

do not know what it holds and I have serious doubt whether Justice Brennan knows what it holds. Of course, maybe you can unscrew the unscrutable.

Mr. RAUH. Senator Ervin, I will try to sum up the *Green* case holding this way.

Senator BAYH. May I say, just before we get off the degree to which you have involved yourself in the discussion of these cases with some particularity, that I think the accusation that has been leveled at the Presidential appointee to the Supreme Court, that he is indeed either a segregationist or inclined that way, and the question Senator Kennedy and Senator Hart proposed the other day that our consideration of whether the nominee would be able to keep pace with the direction that history has and be able to meet this challenge, I think is a serious accusation.

I personally appreciate the degree to which you are substantiating this as you see it in a case-by-case enumeration, and hopefully those that refute this contention will give us the benefit of their knowledge so that we can make a considered judgment.

It is easy to make a spasmodic accusation, but I think this is serious enough and I appreciate your taking the time to go into it thoroughly.

Mr. RAUH. Thank you, Senator Bayh.

Senator Ervin, I think it probably does sound rather immodest, but I think I know what Justice Brennan was trying to say, and in fact did say.

Senator ERVIN. The closest I can come to Justice Brennan's holding is that I think he held that you could have freedom of choice provided the children chose the way that the Supreme Court Justices thought they should choose. If they could not choose the way the Supreme Court Justices think they ought to choose they would have no freedom of choice.

Mr. RAUH. You know, this will surprise you but I think that is right, only I——

Senator ERVIN. Yes.

Mr. RAUH. I think that is essentially correct, only I——

Senator ERVIN. In other words, you can have freedom to do like Supreme Court Justices want to do but otherwise you cannot have any freedom at all. Personally, I do not think you have any freedom unless you have freedom to do things that the Supreme Court may think are foolish as well as wise, but I am not going to debate that.

Senator HART. Provided they are constitutional.

Senator BAYH. I think it would be fair to say that what those Supreme Court Justices say, whether we agree with them or not, is pretty close to the law of the land.

Senator ERVIN. It may be that personal notions of the Justices rather than the Constitution have become the law of the land.

Senator BAYH. The way I understand it, if you do not follow those personal notions as recorded in cases you are in trouble.

Mr. RAUH. Senator Ervin, I did not want my agreement quite as far away from my explanation of it as it is going to appear, because it is not quite as wholehearted as you might have thought.

I agree that freedom of choice is satisfactory to the Supreme Court where it will bring on the dismantling of the dual school system

previously in effect and will result in a unitary nonracial school system.

Senator ERVIN. Yes.

Mr. RAUH. But freedom of choice is bad where it continues the previous dual school system. In other words, you are quite right when you say that it depends on what the Supreme Court wants, but what they said over and over and over again until it finally seems to be getting through, is that what they want is to dismantle the old segregated school system. You have got to have a unitary school system.

Senator ERVIN. It says you have to have a nonracial school in a country where there are many different races, and that is an impossibility.

Mr. RAUH. You have to have a biracial system, Judge Ervin. You have to have a system where white and black go to schools colorblind, where the law——

Senator ERVIN. You are not being colorblind when you say that. You are taking into consideration a person's color because you have to get people of different colors to mix them up. That is the opposite of colorblindness.

Mr. RAUH. May I——

Senator ERVIN. I will not interrupt you any more. I will let you proceed.

Mr. RAUH. That is all right, sir.

May I suggest why it is not the opposite of colorblind. If you started with a colorblind system, if you had started with *Brown* maybe 100 years ago, or even that might not have been early enough in view of our pattern of slavery, but if you had started with a colorblind system, freedom of choice would have made good sense. But when you start with a dual system, when you start with a racially segregated system, freedom of choice becomes a method of continuing the existing dual system, and what the Supreme Court is saying—and I was trying to count the times on Sunday when I was reading this, I was trying to count the number of times they used the words "dismantle the segregated school system," "getting toward a unitary nonracial system"—they are saying that over and over again, outlawing freedom of choice, but not at all. Let me read this sentence that Justice Brennan uses:

Brown II—

That is the 1955 decision—

was a call for the dismantling of well entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating State compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.

Now, freedom of choice did not arise at the early stages, Senator Ervin. It came in at the end. First there was massive resistance, and the manifesto and all of that to hold back compliance. Then there was transfers out. Then there was closing the schools.

Freedom of choice is just the most recent in a long history of methods to keep this dual school system which the Supreme Court unanimously held had to be dismantled. So what you get here again is Judge Hayns-

worth's opinion in *Bowman* and *Green* reversed 9 to 0 by the Supreme Court, and freedom of choice largely knocked down, although there is a theoretical possibility of places where freedom of choice might be upheld, but I say it is more theoretical than real.

Now, one would have thought, after this 9-to-0 opinion, that Judge Haynsworth would have surrendered or acquiesced or something. But possibly the most shocking thing of all is what he did 4 days after the *Green* decision.

Senator BAYH. The *Green* decision in the Supreme Court?

Mr. RAUH. In the Supreme Court. In *Brewer* v. *School Board of Norfolk* (397 Fed. 2d 37), decided on May 31, 1968, Judge Haynsworth had this to say about freedom of choice:

> This case illustrates the kind of difficult problems that arise when school boards deprive pupils and parents of freedom of choice in assignments. . . ."

Then later he says:

"While I have preference for some form of freedom of choice"—at least two or three times in this dissenting opinion in Brewer he refers affirmatively to freedom of choice.

Now what did he do about that? How did he explain the 4 days; how did he explain *Green?* How did he explain his rebellion against *Green?*

Senator BAYH. Excuse me, I am not certain that you said exactly what *Brewer* held. Haynsworth dissented, and in the dissent he referred favorably to freedom of choice—that was contrary to what was held by the Supreme Court 4 days earlier in *Green?*

Mr. RAUH. Well, that is correct, Senator Bayh, but let me try to make this case clear. What happened there was that you had Norfolk's—I think it must have been its third or fourth—new effort at a desegregated school plan. The majority in an opinion by Judge Butzner knocked this school plan out, rather foreshadowing *Green*, because, and I was coming to that, these opinions were obviously written before *Green*, and I was just going to come to a footnote which explains this.

Judge Buttner for the majority really foreshadows *Green*, but he had obviously written his opinion before *Green*, rather foreshadowing that Norfolk's last school system, last desegregation plan, could not work.

Judge Haynesworth, who had also obviously written his opinion ahead of *Green*, put in this footnote, a very unusual footnote, and I only say Judge Haynsworth wrote it rather than the West Reporting System, because this long document of the Library of Congress seems to say that.

I would not have been sure, and maybe you would want to ask Judge Haynsworth, I would not have been sure from looking at the case whether a reporter for the West Publishing Co. might not have made inquiry, but it comes in the middle of a freedom of choice sentence of Judge Haynsworth's, so I rather believe that the Library of Congress was correct when they said Judge Haynsworth himself had written this footnote. It reads as follows:

> While the opinions in this case were not announced until May 31, 1968, they were written prior to the opinions of the Supreme Court in *Green* v. *School Board* decided May 27, 1968.

Now, what is so unusual about that is that he went ahead and filed his opinion. He refused to change his opinion. Judge Haynsworth was for freedom of choice after the Supreme Court said you should not be, and it was last year.

Senator HART. Are you saying that the majority in that circuit in the *Brewer* case in effect anticipated *Green?*

Mr. RAUH. Yes, I am.

Senator ERVIN. They went further than *Green*. They intimated a child ought not to be allowed to attend a neighborhood school unless it would produce integration. In effect, they held that the children of Norfolk should be herded around like cattle and shifted around like pawns in a chess game to produce integration?

Mr. RAUH. Or you could put it, sir, that they said the zones had to be redrawn.

Senator ERVIN. In other words, in its decision, I believe the Court violated the *Brown* case because it denied children the right to attend their neighborhood schools and required them to be taken somewhere else because they needed children of their race to integrate a school somewhere else. So, they really took their race into consideration when they assigned them away from their neighborhood school.

Senator BAYH. With all due respect, is that what is in that decision?

Senator ERVIN. That is the intimation.

Senator BAYH. Is that what is in the decision or is that my distinguished colleague's interpretation of what is in the decision?

Senator ERVIN. That is my interpretation and it is also the interpretation that the Washington Star put on it. I am going to put that article in the record later. The case was an attack on the neighborhood school system.

Mr. RAUH. Judge Butzner in the majority opinion says:

The boundaries of area 4—

Which he knocks out—

are drawn so Negro students who live nearer a predominantly white school are assigned to the more distant Washington school while white pupils who live near Washington are assigned to a more distant predominantly white school.

It does not sound to me to be exactly as you put it. It does seem to me to be in direct line with *Brown*.

But in answer to Senator Hart's question, I have to improvise a little bit here, because the majority do put *Green* in, but I do not see why we should not accept Judge Haynsworth's suggestion that the opinions on both sides were prepared before. Yet Judge Butzner seems to have sort of foreseen the whole problem of the *Green* case, and dealt with it, but my reason for bringing this up, and of giving its importance, is that last year Judge Haynsworth insisted on speaking for freedom of choice 4 days after the *Green* opinion had come down unanimously, and without withdrawing it, rewriting it.

Even if he could not concur in the majority, he did not have to say, he did not have to express his preference for freedom of choice. That seemed to be a dead giveaway of the point I have been trying to make really all morning, which is that Judge Haynsworth has tried to hold up desegregation, has tried to block integration, has in fact helped segregation at every turn that he could.

Senator BAYH. Could I interrupt just a moment before we get away from the *Brewer* case?

Mr. RAUH. Yes, sir.

Senator BAYH. I would like to clarify this, since there seems to be a difference in the interpretation you place on the case and that of Senator Ervin. As you see it, does the dissenting opinion in *Brewer* say that Judge Haynsworth supports a Norfolk plan which takes Negro children and transports them to a more distant location so that they can be in black schools and takes white children and transports them to a more distant location so they can be in white schools?

Mr. RAUH. I do, sir; I do believe that is what the majority holding is. And the final sentence of Judge Haynsworth in the case, in a——

Senator BAYH. The reason I asked that, I think freedom of choice can mean different things to different people, but in that case that is exactly what freedom of choice means?

Mr. RAUH. This was not the normal freedom of choice plan. This was not the same kind of freedom of choice case that went up in *Green*. Judge Haynsworth was gratuitous on freedom of choice. The real point I am trying to make about *Brewer* is that Judge Haynsworth's reference to freedom of choice 4 days after the *Green* case was largely gratuitous, and that only to my mind makes it worse.

I do not know what he was trying to say, but I believe he was trying to say that:

We have got to tell that Court the trouble you get into when you do what they just did.

Now, that is the affirmative part of the case for our side, although I want to make it perfectly clear there are a lot of people who know a lot more about this than I do, and they are going to be here. I have learned everything I said this morning out of the books, but the lawyers are going to be here who dealt with these cases, and they are going to be able to talk about the delays of Judge Haynsworth on civil lights.

I only know it from the books. I saw the 7 months' delay in *Griffin v. Prince Edward County*. But these other lawyers, distinguished lawyers from the NAACP in the South, from other organizations, the ones who have actually handled cases before Judge Haynsworth, are going to be able to show you a record of delay and dilatory action beyond anything within my ability. We are testifying here, Mr. Mitchell and I, on behalf of the Leadership Conference, on behalf of the open record of the cases. There will be others who will testify as to delays that will be in addition to this.

Now, however, I would like to deal with a document that has been circulated and which you might call the pro-Haynsworth civil rights side, because it would not be a full case if one did not deal with it.

The document is a letter:

"Dear Sir:"—it does not say to whom, but it sure got wide circulation—dated August 16, 1969, and written by Daniel G. Grove, former habeas corpus clerk for the circuit court of appeals and Lewis M. Natali, Jr., former law clerk to Judge Herbert Boreman of the circuit court of appeals.

The letter started with a little attack on those of us who have been against Justice Haynsworth on the segregation cases, and it is my pur-

pose for maybe 5 minutes, Senator Hruska, to analyze this and to show this letter's worthlessness and then to stop.

I would like to deal with this letter because of its wide circulation, and my assumption that it will be put into the record of this hearing by someone.

The letter other than its snide remarks about me and my friends, about which I will say nothing, really is the letter of someone who has not done his homework.

Let me read to begin with this sentence from the letter:

> This brings us to the freedom of choice decisions. In the Charles City County and New Kent County, Va. cases, Judge Haynesworth, with the concurrence of the full court, including Simon Sobeloff—

and then he spends about a page on what a great man Simon Sobeloff is——

Senator ERVIN. I do not believe that has been put in the record. Suppose you put it in the record so we will have it available so we can make our own appraisal of it.

Mr. RAUH. Certainly. I will see that a clean copy is obtained because my copy has got my writing and annotations on it, but I will try to get a clean copy of it.

(The letter referred to follows:)

AUGUST 16, 1969.

DEAR SIR: Recent press reports concerning the rumored nomination of Clement F. Haynsworth, Jr., Chief Judge of the United States Court of Appeals for the Fourth Circuit, to the United States Supreme Court have included statements from certain national organizations and political figures that Judge Haynsworth is a "segregationists judge" who is "only casually concerned with civil rights." It is, of course, simple to label someone with a distasteful descriptive such as "segregationist" or "racist." In the case of Judge Haynsworth, however, this cheap high school debating technique falls flat on its sophomoric face when exposed to the record Judge Haynsworth has compiled while sitting as a federal appeals judge for twelve years.

Without resort to more rhetoric it would seem appropriate to examine the record in the areas of civil rights, civil liberties and criminal law and to permit that record, not ill conceived labels, to speak for itself.

Perhaps the most celebrated school desegregation litigation in the Fourth Circuit involved the Board of Supervisors and the School Board of Prince Edward County, Virginia. It will be recalled that schools were closed in that county for several years in an attempt to avoid integration. In 1959 Judge Haynsworth voted to void a lower court order granting that county 10 years to integrate the schools and ordered instead that the county integrate the schools immediately, despite the real possibility of violence resulting from such action.[1] Subsequent to that decision the schools were closed and white children attended "private" schools receiving state aid. In a suit attacking the closing of the schools, Judge Haynsworth, in 1963, cast the deciding vote in an opinion holding *not* that the Prince Edward County practices of school closing and tuition grants were constitutional but that the federal court should abstain from deciding such issues until the Virginia Supreme Court had decided the peculiar issues of Virginia law, e.g., whether the state had a duty to provide an educational system. This decision was reversed by the Supreme Court but only *after* the Virginia Supreme Court ruled on the matters of state law.[2]

A fair reading of Judge Haynsworth's opinion leaves little doubt of his view of the law assuming certain facts. He wrote:

> Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command.

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[1] *Allen* v. *County School Bd. of Prince Edward Co.*, 266 F. 2d 507 (1959).

[2] *Griffin* v. *County School Bd. of Prince Edward County*, 322 F. 2d 332 (8/2/63), rev'd and rem., 377 U.S. 218 (1964). See 204 Va. 650, 133 S.E. 2d 565 (12/2/63).

If Prince Edward County has not completely withdrawn from the school business, then it cannot close some schools while it continues to operate others on a segregated basis.[3]

After the Supreme Court decision in the Prince Edward case, the county officials took a new avenue of resistence by opening public schools while, at the same time, financing the white "private" schools with public monies. The result was another segregated school system with only Negroes attending the public schools. In 1965 Judge Haynsworth voted for a decision striking down this plan and ordering the county to cease payment to the "private" school.[4] While this case was pending before the court, county officials, contrary to an informal request made by the court and without objection by the opposition lawyers, appropriated over $100,000 to the "private schools." The individuals involved in this action were cited for contempt and ordered to pay back this money by a split (3–2) decision of the court.[5] Judge Haynsworth dissented but far from endorsed the supervisors' action.

He wrote "I find no fault with the decision of my brothers concerning the award of fees for counsel, and I am not in disagreement that the conduct of the Supervisors was unconscionable." His dissent was based on what he conceived to be the lack of power of the court to take such action where no official court decree was in existence at the time of the supervisors' actions. The statute upon which the contempt citation was based required "Disobedience or resistence to [the court's] . . . lawful writ, process, order, rule, decree, or command." In an as yet unpublished critique of this case, a leading academic expert on the power of federal courts has reportedly stated that the Haynsworth decision was correct.

Another noted school case involved the Richmond Board of Education. In 1965 Negro pupils in Richmond, Virginia brought a case to the Fourth Circuit seeking review of denials of a petition to order the board to make a general order of integration for the schools plus a request for action to insure that teaching staffs be integrated. On appeal the pupils conceded that the freedom of choice plan then in operation was not employed discriminatorily and that the transfer was a matter of right upon request. The Court, in an opinion by Judge Haynsworth, held that the freedom of choice plan was not designed to promote segregation and that the teacher question was important but could not be decided until a hearing had been held to determine the evidence. He stated that the teachers were entitled to a full hearing on the merits. The decision left the District Court the power to decide how the question should best be resolved. In a short opinion the Supreme Court vacated and remanded this part of the case only, holding that the District Court should be ordered to hold such a hearing. The Court made no comment on the rulings concerning the freedom of choice plan.[6]

In the celebrated "Civil Rights Removal Cases" involving the power of federal courts to try civil rights demonstrators charged with violations of state laws, the Chief Judge authored the majority opinion for a sharply divided court (3–2) holding that state criminal prosecutions against civil rights marchers could not be removed to federal court under the 1875 Civil Rights Act. This complete and scholarly opinion was affirmed by the Supreme Court (5–4) with such "civil rights foes" as Messrs. Justice Black and White voting to affirm. While such a decision was an apparent blow to southern civil rights workers, in that it prevented immediate federal relief from sham prosecutions, subsequent federal review was, of course, still available. The Haynsworth opinion was based on the theory that the statute involved narrowly circumscribed the instances when removal from the state court could be had only in cases in which the state criminal process was definitely lacking in the guarantee of some fundamental constitutional right.[7]

When the State of Virginia was finally given its chance to prosecute the civil rights workers in these cases, prosecution was declined in the great majority of cases. This was, of course, factual vindication of the theory of the majority to permit the state the first chance to handle its problems. The closeness of the vote in both courts indicates the complexity of these issues. To label the majori-

[3] 322 F. 2d 332, at 336, 338.
[4] 339 F. 2d 486.
[5] 363 F. 2d 206.
[6] 345 F. 2d 310. See 345 F. 2d 325 and 329, rev'd 382 U.S. 103.
[7] *Baines* v. *City of Danville*, 357 F. 2d 756, aff'd, 384 U.S. 780, 808 (1966). Main opinion is Peacock case from 5th Cir., however. Baines opinions from 4th Cir. relied upon for reasoning of both majority and minority to a great extent.

ties of either court racist or even opposed to civil rights aims from such a result appears to ignore all legal and logical reasoning.

This brings us to the freedom of choice decisions. In the *Charles City County* and *New Kent County, Virginia* cases, Judge Haynsworth, with the concurrence of the full court, including Simon Sobeloff, who as Solicitor General argued the landmark case of *Brown* v. *Board of Education* and whose reputation for liberality in civil rights matters is nonpareil, held that where there is concededly no evidence of coercion or restraint, an H.E.W. approved freedom of choice plan for pupil registration was not unconstitutional. Thus the school boards were not required to take affirmative action to redress de facto racial imbalance. However, in the area of faculty imbalance, Judge Haynsworth required the state to take affirmative measures to correct improper teacher ratios. Subsequently, the Supreme Court ruled that there was a positive duty on the part of the school boards to alter student racial imbalance. This was, however, a clear and substantial change in the law which was not easily foreseeable.[8]

If there be any doubt as to his dedication to the law, even a casual reader of *Coppedge* v. *Franklin County Board of Education*, should suffice to dispel it.[9] There, prior to the Supreme Court's abolition of all freedom of choice plans, he authored an opinion ruling that such plans, when accompanied by acts of violence and incidents of coercion, were illusory and that much more was required of the local school board. Referring to the lower court's order to accomplish immediate integration, he wrote:

"Indeed it [the court] would have been very derelict in its duty had it permitted the school board to proceed on its indifferent way after its less than half-hearted compliance with its faculty desegregation order and the abundant evidence that the intimidating activity had a chilling effect on the Negro residents of the district." [10]

In less heralded cases where the civil rights issues were in sharper focus and unclouded by superimposed issues such as abstention, removal and the power of contempt, Judge Haynsworth's record is also consistent with the concept of abolishing a two class society within the framework of the law.

In 1966 he ordered the North Carolina Dental Society (an allegedly private organization) to admit Dr. Reginald Hawkins, a Negro, because denial of admission was state action.[11]

Time and again Judge Haynsworth has voted with the majority to take the following action:

1. Speeded integration of a public golf course.[12]
2. Voided discriminatory discharge of a Negro teacher after all Negro students transferred out of school.[13]
3. Ordered integration of faculty.[14]
4. Denied white student's claim of reverse discrimination in the redrawing of boundaries.[15]
5. Enjoined school boards from discriminatory application of North Carolina Pupil Placement Law.[16]
6. Ordered school boards to admit all new students to schools of their choice and to advise parents of freedom of choice at the time of initial assignment.[17]
7. Voided boundaries drawn with intent to perpetuate segregation despite unencumbered freedom of transfer rule.[18]
8. Held that burden of proof to show lack of discrimination rests upon school boards with history of discrimination and not upon Negro plaintiffs.[19]
9. Granted student who had been allowed by court order admission to white school to retransfer to another school when original school changed character and became all Negro.[20]
10. Held that faculty and pupil desegregation go hand-in-hand and that teacher assignments cannot be made on the basis of race.[21]

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[8] 378 F. 2d 320 (1967).
[9] 394 F. 2d 410 (1968).
[10] 304 F. 2d at 413.
[11] 355 F. 2d 607.
[12] *Cummings* v. *City of Charleston*, 288 F. 2d 817 (1961).
[13] *Wall* v. *Stanley County Bd. of Educ.*, 378 F. 2d 275 (1967).
[14] *Bowman* v. *County School Bd. of Charles City*, 382 F. 2d 326 (1967).
[15] *Warner* v. *County School Bd. of Arlington*, 357 F. 2d 452 (1966).
[16] *Wheeler* v. *Durham Bd. of Educ.*, 309 F. 2d —— (1961).
[17] *Felder* v. *Hartnett County Bd. of Educ.*, 349 F. 2d 366 (1965).
[18] *Wheeler* v. *Durham Bd. of Educ.*, 346 F. 2d 768 (1965).
[19] *Chamber* v. *Hendersonville County Bd. of Educ.*, 364 F. 2d 189 (1966).
[20] *McCoy* v. *Greensboro Bd. of Educ.*, 283 F. 2d 667 (1960).
[21] *Wheeler* v. *Durham Bd. of Educ.*, 363 F. 2d 738 (1960).

11. Refused to dissolve seven year order against school board in spite of indication school board moving to integrate.[22]

Judge Haynsworth has also voted to enforce the public accommodations section of the Civil Rights Act of 1964 to require both drive-in and walk-in restaurants to serve Negroes.[23] He has also concurred in opinions which permit the awarding of counsel fees to prevailing Negro plaintiffs who are forced to sue in order to overcome frivolous allegations.[24]

In his only apparent deviation from a steady course of pro-civil rights decisions, Judge Haynsworth dissented from a majority opinion by Judge Sobeloff holding one section of the Hill-Burton Act of 1964 unconstitutional because it allowed federal grants to private hospitals which had a policy of excluding Negro doctors and dentists from their staffs. The Haynsworth dissent, however, centers around the question of what is "state action" under the Fourteenth Amendment. At the time of the decision, 1963, that phrase had not been given the broad meaning attributed to it now. Judge Haynsworth pointed out that the only connection between the state and the hospital was the fact that application for grants had to be made through a state commission. The federal money was given with no strings attached and was intended to encourage hospital improvement. Judge Sobeloff held that where the state enacted laws to take advantage of the Hill-Burton money and to encourage hospital improvement, neither public or private, sufficient state action existed to forbid discriminatory hospital policies.[25]

More importantly, in 1967, Judge Haynsworth voted with the majority in ruling that a Negro doctor was entitled to membership on the staff of a previously all-white hospital and that room assignments could not be made on the basis of race. In that case the court was confronted with the hospital's contention that membership could only be granted after a secret ballot of its members. That contention was rejected and it was held that where a doctor meets all of the "paper" qualifications and proves his competency in a specialty, the burden of proof falls on the hospital to show lack of discrimination.[26]

Judge Haynsworth's record in the area of criminal law and procedure is best set out by reference to the landmark decisions he has penned. In *Rowe* v. *Peyton*[27] he furnished an in-depth analysis of the nature of the Great Writ of habeas corpus. His opinion permits state prisoners to attack their convictions in federal court although they have not yet begun service of the sentence on the conviction being attacked. In so doing Judge Haynsworth demolished an earlier Supreme Court opinion which prevented such action. This revitalization of the Great Writ was unanimously affirmed by the Supreme Court.

Again in *Word* v. *North Carolina*, he expanded the Great Writ to permit prisoners serving sentences in one state to attack a future sentence in another state.[28]

Judge Haynsworth has written an opinion which adopts the humane and modern definition of insanity proposed by the American Law Institute. This new rule applies to all criminal trials in the federal courts within the Fourth Circuit.[29]

In another mental health case Judge Haynsworth struck down the practice of denying persons found incompetent to stand trial the same rights granted to persons who were placed in mental institutions through so called "civil commitment."[30]

In cases involving unpopular defendants and causes the Judge has taken positive steps to insure individual liberty. He upheld a decision releasing H. Rap Brown on personal recognizance in the custody of his lawyer. The unusual factor of this case is that, in the face of strong state objection, a federal court invoked the writ of habeas corpus to release a prisoner in state custody prior to trial.[31] In another case he concurred in a decision permitting Black Muslims to sue for injunctive relief under the Civil Rights Act when they alleged the denial of religious rights while in prison.[32]

In *Langford* v. *Gelston* Judge Haynsworth voted to enjoin nighttime police raids in ghetto areas in search of notorious "cop killers." The suit brought by the N.A.A.C.P., was a great victory for the right of privacy in face of police

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[22] *Brooks* v. *County Bd. of Arlington*, 324 F. 2d 303 (1963).
[23] *Newman* v. *Piggie Park Enterprise, Inc.*, 377 F. 2d 433 (1967); *Wooten* v. *Moore*, 400 F. 2d 239 (1968).
[24] Ibid.
[25] *Simkins* v. *Moses Cone Memorial Hospital*, 323 F. 2d 959 (1963).
[26] *Cypers* v. *Newport News General & NonSectarian Hospital Ass'n*, 375 F. 2d 648 (1967).
[27] 383 F. 2d 709 (1967), aff'd, 391 U.S. 54 (1968).
[28] 406 F. 2d 352 (1969).
[29] 393 F. 2d 920 (1968). See also *United States* v. *Wilson*, 394 F. 2d 459 (1968).
[30] *Miller* v. Blalock, —— F. 2d —— (5/69).
[31] *Brown* v. *Fogel*, 387 F. 2d 692 (1967).
[32] *Sewell* v. *Pegelow*, 291 F. 2d 196 (1960).

activity based on anonymous tips. The Court ordered the injunction even though the Baltimore police had agreed to cease their illegal activity.[33]

More recently Judge Haynsworth wrote for the court in a decision striking down as unconstitutional city ordinances which prohibited the passing out of handbills and required a license to solicit members for organizations. Holding in favor of the United States Steelworkers, Judge Haynsworth ruled that such laws were in violation of the First Amendment.[34]

Lawyers are taught that the law resides in what is written, perhaps the sum and substance of a judge resides in his opinions, and certainly is not determined by his mailing address. It remains to be asked whether these opinions are the work of a "segregationist" or "one only casually concerned with civil rights."

We think not.

Sincerely,

DANIEL G. GROVE,
Washington, D.C., former habeas corpus clerk,
Fourth Circuit Court of Appeals.
LOUIS M. NATALI, JR.,
Philadelphia, Pa., former law clerk to Judge Herbert Boreman,
Fourth Circuit Court of Appeals.

Mr. RAUH. The letter says:

"With the concurrence of the full court, including Simon Sobeloff"—who is a great man, and if he had concurred in it I would be very surprised, but he did not concur in it. And he used those words "concurring specially" which I referred to, but on the big point he disagreed. In other words, if they had even read the *Green* case in the Supreme Court they would have seen that the Supreme Court said Judge Sobeloff disagreed with Judge Haynsworth, and yet this letter suggests that Judge Sobeloff concurred.

Secondly, just to give another example of the inadequacy of this letter, they refer to a case called *Coppedge* v. *Franklin County Board of Education* as sufficing to dispel any question about Judge Haynsworth.

That was a freedom of choice case where Judge Haynsworth ruled against freedom of choice. Small wonder. This is what happened in that case. This is a quote:

> Shots were fired into houses; oil was poured into wells, and some of the Negro leaders were subjected to a barrage of threatening telephone calls. The violence was widely reported in the local press, and an implicit threat was carried home to everyone by publication of the names of Negro applicants for transfer.

How could anybody ever consider that that freedom of choice plan could be valid? People were getting shot at for exercising their freedom of choice. I find it of no significance that Judge Haynsworth thought that people should not be shot at.

Senator BAYH. Which case was that?

Mr. RAUH. Sir, that is *Coppedge* v. *Franklin County Board of Education.* It is at 394 F. 2d 410.

Now, on another page they list maybe about 14 cases where Judge Haynsworth voted on what one would say was the civil rights side. All but three were unanimous. They are cases like the one I just gave you. There is a wonderful one that they rely on.

The statement in this letter is "Judge Haynsworth speeded integration"—now here he is voting with the majority—"He speeded integration of a public golf course."

It was a great decision. They moved up integration from 8 months to 6 months. There was not any reason why you should have any delay in integrating a public golf course. It may be one thing to integrate a

[33] 364 F. 2d 197 (1966).
[34] *United Steelworkers, C.I.O.* v. *Bagwell,* 383 F. 2d 492 (1969).

school, that might take a little while to work out, but what in heaven's name is the ground for delay in the integration of a public golf course?

So they move it up from 8 to 6 months. I am suggesting that of these dozen or so cases that were unanimous, there is not one of them that shows anything except obviousness, and that they are no slightest contradiction of the position that I have taken this morning.

But funnier for the authors of this letter, of the three cases that were not unanimous, Judge Haynsworth with the majority was on the anti-integration side. One of the cases they refer to is *Bowman* v. *County School Board of Charles City*, and they have it under the heading "Ordered Integration of Faculty."

But what they forgot was that the Supreme Court had reversed it nine to nothing on the freedom of choice point in the *Bowman* case. Far from Bowman being as these young men are suggesting a feather in his cap as an integrationist decision, it was the very decision that was being unanimously reversed in *Green*.

Then the second of the two where I said he was on the conservative side in the cases the clerks are relying upon, the court was unanimous in a drive-in case except that the majority denied counsel fees under circumstances that will badly hurt the enforcement of the Civil Rights Act of 1964.

In other words, they have taken a dozen meaningless cases that could not have gone any other way, that were unanimous, and suggested that in some way they offset the cases to which I have referred.

And finally, I would make just one more point about this letter and then I am finished, and it is this. On page 6 of this letter it says:

> At the time of the decision in Moses Cone Hospital, that phrase [referring to state action] had not been given the broad meaning attributed to it now.

Wilmington Parking had been decided 2 years earlier, and *Wilmington Parking* remains to this day the leading case on State action. In other words, I suggest that this letter, which is by the law clerks of the fourth circuit, by these two law clerks, be treated for what it is worth.

It is not a carefully done document. It has misstatements. It refers to unanimous decisions of no consequence, and two of the only three where there was the slightest division, Senator, Judge Haynsworth was on the anti-civil rights side. This letter and the cases they refer to does nothing to change the picture that I have been trying to develop this morning of a segregationist judge by which I mean one who, where there was any way of taking the anti-civil rights position, took it.

I thank you, sir, and I hope I did not go much beyond that 20 minutes.

(Leadership conference statement dated September 9, 1969, follows:)

MEMORANDUM OF LEADERSHIP CONFERENCE ON CIVIL RIGHTS CONCERNING JUDGE HAYNSWORTH

The unique function of the United States Supreme Court is that it is empowered to speak with finality on issues of constitutional interpretation, as, for example, in civil rights, which is probably the nation's number one domestic concern. Decisions of the Court substantially influence and shape the life of the

nation well into the indefinite future. The record of the current nominee to the Supreme Court, Fourth Circuit Court of Appeals Judge Clement F. Haynsworth, unlike that of any present or recent Justice, is one in support of the cause of segregation. Judge Haynsworth indicates by his decisions that he would vote for no forward movement on racial issues and that on many such issues he holds views that would lead to retreat.

Judge Haynsworth's adherence to constitutional views which are at war with the struggle of Negroes for equal citizenship may be illustrated by two cases in the area of health care: *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963), and *Eaton* v. *Grubbs*, 329 F. 2d 710 (1964). In *Simkins*, Judge Haynsworth dissented from a ruling by his court that since the hospital received $1,269,950 in federal Hill-Burton Act funds under North Carolina enabling legislation, it could not discriminate racially. He thought that since the hospital had been established privately it could discriminate despite receipt of federal money through the state. The Supreme Court refused to review the majority's ruling. Nevertheless Judge Haynsworth later indicated in *Eaton* v. *Grubbs* that he still adhered to his former views and went along with the majority in the *Eaton* case raising the same issues only because of the earlier precedent. On the high court he would not be so bound and would likely throw his weight towards repeal of the *Simkins* doctrine.

His sentiments on the issue of integration in fact as contrasted with lip-service acceptance of abstract theoretical equality may be shown in *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (1962). Judge Haynsworth dissented from the majority vote to outlaw the practice of granting transfers to pupils to enable them to leave a school district where racial desegregation was in process. The thrust of Judge Haynsworth's argument for transfers was that desegregation was a "searing experience" (p. 928). The Supreme Court in a Tennessee case, *Goss* v. *Board of Education*, 373 U.S. 683, rejected his reasoning.

In 1963, in the famous Prince Edward County, Virginia, school case, Judge Haynsworth, with another judge of a three-judge court, denied a hearing in federal courts of the suit black parents of children who had had no schooling for four years had brought against the County, after it had kept closed all public schools under the so-called "Massive Resistance" to school desegregation statutes. (*Griffin* v. *Board of Supervisors*, 322 F.2d 332 (1963). The denial well served the massive resistance strategy since it committed black children to further delay in obtaining an education. The Supreme Court reversed in an opinion that can only be described as an outright rebuke to Judge Haynsworth, 377 U.S. 218 (1964).

Equal protection of the laws has been the touchstone of Negro advance in our land. Judge Haynsworth's negative attitude toward this cornerstone of the Fourteenth Amendment is illustrated by the following excerpt from his *Griffin* opinion:

"The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often repeated statement of Anatole France, 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality."

Repeatedly, Judge Haynsworth has voted for delay in desegregation cases. This is, of course, crucial because long delay, sometimes interminable, is one principal means of maintaining segregation. Rarely, do courts or government officials say nowadays that segregation is valid. They put integration off to another day on one ground or another and through delay they maintain segregation. Judge Haynsworth has thus allied himself with the cause of segregation.

A recurring feature in Judge Haynsworth's record has been a tendency to pay "lip-service" to desegregation while joining in orders granting inadequate

relief to Negro civil rights complainants which facilitated further delays. In *North Carolina Teachers Association* v. *Asheboro City Board of Education*, 393 F.2d 736 (1968), Judge Haynsworth joined in a majority opinion which gave only limited relief to teachers who lost their jobs "teaching the Negro pupils." Judge Sobeloff, concurring in part and dissenting in part with the majority opinion, said that he was of the view that the limited measure of relief granted certain of the plaintiffs *was inadequate*. Another case in point was *Jones* v. *School Board of City of Alexandria, Va.*, 278 F.2d 72 (1960). In this case the court denied relief where the school board had rejected applications by blacks for transfers. It assumed that the board acted in good faith even though the opinion was written during the uproar and heat of the "Massive Resistance" in Virginia.

As late as 1965, the Supreme Court reversed an opinion and judgment upholding unnecessary delay, written by Judge Haynsworth, with the following words:

"There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reason for postponing these hearings. . . . These suits had been pending for several years; more than a decade has passed since we directed desegregation of public school facilities 'with all deliberate speed.' . . . *Delays in desegregating school systems are no longer tolerable.*" (Emphasis supplied.) *Bradley* v. *The School Board of the City of Richmond, Va.*, 382 U.S. 103, 105 (1965), reversing 345 F. 2d 310.

In *Bowman* v. *School Board of Charles City County*, 382 F. 2d 326 (1967), Judges Sobeloff and Winter wrote of Judge Haynsworth's majority opinion upholding "freedom of choice":

"I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school system to take further steps at *this stage*. No legally acceptable justification appears, or is even faintly intimated for not immediately integrating the faculties. . . . The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

"It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their tasks—no longer avoidable or deferable—to integrate their faculties" (at p. 336).

The Supreme Court agreed with Judges Sobeloff and Winter and unanimously reversed the Haynsworth opinion in a companion case, decided by the 4th Circuit Court of Appeals on the authority of *Bowman*. *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

Judge Haynsworth has ruled in numerous race relations cases. In assessing his possible future role as a Supreme Court Justice, the important rulings are those which were made by divided courts, for that is where his legal philosophy becomes apparent. In such cases clear-cut reversals by the Supreme Court of the United States demonstrate that he will not only be to the right of any sitting or recent justice when he sits on a court from which there can be no appeal but also that there will be on the Court the first Justice since the principle of desegregation was announced whose devotion to that principle is in question. Confirmation of Judge Haynsworth will deal a serious blow to progress in civil rights and throw another log on the fires of racial tension.

Senator ERVIN. You referred to Judge Cardozo for whom I have the highest respect. I think it is very significant that he said in "The Growth of the Law" on page 10:

"In breaking one set of shackles we are not to substitute another."

Now, I will ask you if the position of the organizations for whom you speak is not this in respect to public schools: That we should outlaw State imposed segregation, and substitute federally coerced integration, regardless of what the black and white parents whose children are affected think about it?

Mr. RAUH. It would be very hard, sir, to speak for 125 organizations——

Senator ERVIN. Well, you are here speaking for them.

Mr. RAUH. I was going to finish, if I could finish my sentence on that exact question.

I would like to describe the answer in general terms and say what I think that most of them do believe. We did agree to oppose Judge Haynsworth, and I think I have said nothing this morning that would not have wide concurrence in the groups we speak for.

Mr. Mitchell, my partner in all of this, would have quickly kicked me if I had misspoken. But on the question of how far one goes to get integration, there are serious problems. But I want to suggest to you, sir, that you do not reach——

Senator ERVIN. Suppose you answer the question. It can be answered yes or no.

Mr. RAUH. No, it cannot, not the way you put it. Federally coerced integration is a separate problem and I have to deal with it separately. There are differences between areas where you had a dual school system, and areas where you never had a dual school system and where you had only de facto segregation. If you would like to discuss this I am perfectly willing——

Senator ERVIN. I do not want to discuss it too long. I think you are agreeing with my proposition.

Mr. RAUH. I may be, I may not be. I only want to distinguish between the areas where you started with a dual school system—where Judge Haynsworth worked and where he worked to help the dual school system and to save the dual school system—from an area where you have de facto segregation.

Now, obviously we feel everything must be done to end the dual school system the way the Supreme Court has said to——

Senator ERVIN. That is an admission of the fact that you feel the Federal Government and courts must mix the school children where black and white children are available for mixing regardless of what kind of procedures you have to go through to mix them.

Mr. MITCHELL. Senator Ervin, could I make a comment on that briefly.

I think where I would have trouble in trying to answer your question is with the word "coerced." The people of this country pool their resources to open national parks, they pool their resources to have an army and a navy. They pool their resources to have a public school system.

It is not coercion, it seems to me, to say that when you go to the national parks you are not to expect that there will be separate dining rooms and separate canyons that white people can have, nor that when you go into the Army and the Navy you would expect to have a separate Army and Navy, or when you go to the public schools you have a separate public school.

Senator ERVIN. But no Federal judge orders people to be dragged or transported to the national parks and no HEW people offer funds if they go to the national parks, but withhold the funds if you do not go.

Mr. MITCHELL. I would say that these questions run throughout every matter wherein there is State or Federal action, and in all the years that I have been dealing with them, it has been inescapable that at some point some authority had to make a decision that if these facilities are going to be available and open to the public, they had to be open to

everybody. Also some plan had to be devised so that they would not return inadvertently to a segregated system.

Senator ERVIN. There is no use for us to argue this because I think that it is as clear as the noonday sun in a cloudless sky that the organizations which you gentlemen represent violate this philosophical thought of Judge Cardozo, that is, in breaking one set of shackles we must not substitute another. I think the records show that these organizations have a firm-policy conviction that insofar as public schools south of the Mason-Dixon line are concerned, we must substitute for outlawed State-imposed segregation Federally imposed integration, no matter how much the black and white parents of these children may be opposed to it in particular cases. Now, this question comes down to this.

Mr. RAUH. May I answer the "shackles" point, because the words of Justice Cardozo are very dear to me. I would simply like to suggest that I do not feel we are out of the shackles of segregation. I do not think we have reached any point where we can talk about the shackles of integration. I think we are still under the shadow of the shackles of segregation in this country.

Senator ERVIN. You do not think that they will ever be out of the shackles of segregation until you forcibly integrate all people whether they want to be integrated or not, and until you deny children the right to go to their neighborhood schools if it is not going to produce integration, but I will go to another point and I will just state I am trying to save time.

Mr. MITCHELL. Senator, would you just permit me to note for the record that I take vigorous exception to your formulation of our position, but I will not press the point in the interests of time.

Senator ERVIN. Having heard you and my good friend Mr. Rauh testify about these matters before, I have come to that absolute conclusion about the position of these organizations. It will not do us any good to argue because everything that has been testified to here is that every case in which Judge Haynsworth participated that failed to achieve immediate integration is a bad decision. It shows he is unfit to be a judge.

Judge Haynsworth is even charged with failing to follow the Supreme Court in the *Charlottesville* case, a case that arose in Tennessee in another circuit and did not even reach the Supreme Court until several years after the *Charlottesville* decision was handed down. In other words, he is a poor prophet.

Mr. RAUH. Sir, that is not quite a fair statement of my position on the *Charlottesville* case. I said that any reasonable lawyer reading Brown would have decided the *Charlottesville* case the way the majority did, and that Goss later came along and proved that was right.

But I did not suggest he should have followed Goss. I said that Goss followed Brown like the night the day.

Senator ERVIN. He is charged in the *Charlottesville* case in failing to follow the decision of the Supreme Court of the United States that was not handed down until after he decided the *Charlottesville* case.

Senator BAYH. Mr. Chairman, there is one little bit of evidence, if I may call that to your attention, and that is the *Dillard* v. *Charles* case.

Mr. RAUH. That is the case, sir.

Senator BAYH. I think we also have to interject that the majority in the fourth circuit agreed with the *Tennessee* case and Judge Haynsworth, as I recall, wrote the dissenting opinion.

Mr. RAUH. That is correct.

Senator ERVIN. The *Goss* case did not even originate in the fourth circuit.

Senator BAYH. That is correct, but I think that what we are trying to do is to find out how philosophically a given judge, who is going to be one of the nine men who are going to be setting policy, not interpreting it, looks at some of these problems, and that is why I raised the point on it.

Senator ERVIN. Mr. Rauh takes the position that any lawyer who does not agree with his views is an unreasonable kind of lawyer.

Mr. RAUH. I do not think I took that position, Senator Ervin.

Senator ERVIN. I think you did just a moment ago.

Senator HRUSKA. Would the Senator yield? I know some lawyers who feel that way about judges.

Senator ERVIN. Yes; I do, too. In fact, I think the witness is exhibit A. Now, I am going to state what I think is crucial in this case on this point. Supreme Court Justices do not control affairs because they are wise necessarily.

I have known a lot of lower court judges much wiser than people sitting on the Supreme Court, for instance, Judge Learned Hand and Judge John J. Parker, but as one of the fellow members of my Supreme Court said on occasion, "We are the final word, not because we possess consumate wisdom but because under the law we have the last yes."

Now the Federal judiciary is a hierarchy in which the judges in the lower echelons are obligated to follow the decisions of the judges in the higher echelons, irrespective of whether they agree or disagree with those decisions. The question in this case is whether or not Judge Haynsworth followed the decision of the U.S. Supreme Court as near as he could after those decisions were handed down. He is not required to be a prophet and anticipate those decisions.

I have here for the record—I am not going to take up the time to read them or to give my intepretation—the case of *Cummings* v. *the City of Charleston*, 28 Fed. 2d 817, the case of *Wheeler* v. *the Durham City Board of Education*, 309 Fed. 2d 603, the case of *Wheeler* v. *the Durham City Board of Education*, 346 Fed. 2d 768, the case of *Hawkins* v. *N.C. Dental Society*, 355 Fed 2d 718, the case of *Wanner* v. *the County School Board of Arlington*, 357 Fed. 2d 452, the case of *Chambers* v. *Hendersonville City Board of Education*, 364 Fed. 2d 189, the case of *Wheeler* v. *the Durham City Board of Education*, 363 Fed. 2d 738, the case of *Wall* v. *Stanly County Board of Education*, 378 Fed. 2d 275, the case of *Bowman* v. *the Charles City*——

Mr. RAUH. That is the one that was reversed by the Supreme Court nine to nothing, sir.

Senator ERVIN. No; I do not believe this was appealed.

Mr. RAUH. I explained——

Senator ERVIN. Here is what Judge Haynsworth held:

That the existence of choice under freedom of choice plan whereby each Negro pupil had an acknowledged, unrestricted right to attend any school in the school system rather than placement of plan by system of compulsive assignments to achieve greater intermixture of the races was not a denial of any constitutional right not to be subjected to racial discrimination.

The court further held that that case involved, among other things, school boards plan for desegregation of faculties would be replanned with direction that some minimal, objective timetable for faculty desegregation be incorporated in the plan.

I think that is sound because it allows the children to choose the schools. The Supreme Court thinks, well, I will not say what they say because I cannot understand.

Mr. MITCHELL. I would like to point out, Senator Ervin, that in my testimony, before you came in, I had mentioned that there were situations where Judge Haynsworth was inclined to give us our rights with an eyedropper. The lawyers who looked at the cases that you have just entered into the record had those in mind when we included that phrase in the testimony because these are the cases, essentially, where it was so clear that the Negroes were entitled to the rights that they were given that you really were not breaking any great new ground in giving the kind of decision that was given.

Senator BAYH. May I pose a question?

Senator ERVIN. Just one second. I am about through. Also in addition *Coppedge* v. *Franklin Board of Education* 394 Fed. 2d 410, case of *Felder* v. *Harnett County Board of Education* 409 Fed. 2d 107.

(The opinions submitted by Senator Ervin appear in the Appendix.)

Senator ERVIN. I have read these cases. I am not going to bother interpreting them now but in my honest judgment every one of these cases shows that Judge Haynsworth was not actuated by any racial discrimination in performing his duties in school integration cases, and I leave it up to the Senators when the time comes to interpret these cases for themselves.

Mr. RAUH. I would like to respond to that, because these cases, sir, are practically the same ones that I was referring to before. For example, you referred to Coppedge. That is the one where shots were fired into the houses. You cannot reasonably believe that any judge could have upheld a plan that resulted in shots getting fired into Negroes' homes, oil poured into their wells, and publication in the press of their names. I mean to suggest that that is not a civil rights decision, it is simply a decision for civility and telling people they cannot be shot.

Senator ERVIN. The judge did not do the shooting. The judge did not do the shooting, but he did just exactly what you and Mr. Mitchell say ought to be done. Judge Haynsworth upheld the ruling of Judge Algernon L. Butler, the district judge, that the district must be run around in some way to get white and black children so you can mix them in the schools.

Mr. RAUH. There was no case you cited there in which any reasonable man could have taken the other side. Most were unanimous. In the *Bowman* case you cited, that is where he was overruled by the Supreme Court nine to nothing. In the only other case he wrote, it was a joke it was so obvious. Judge Haynsworth said that a Negro had to have a right to get into a dental society. By 1966 that had been decided in a dozen jurisdictions.

Senator ERVIN. I regret that you feel that reasonable men could not differ in this area.

Mr. RAUH. You were not suggesting that you would have decided those cases differently; were you?

Senator ERVIN. I think they were sound decisions. I think they were decisions which were required at the specific time they were handed down by opinions of the Supreme Court of the United States. I think that Judge Haynsworth truly fulfilled the obligation devolving upon him as a judge of an inferior Federal court in handing down these decisions, because I think they are in harmony with the others.

I think the *Moses H. Cone* case is a case where the hospital was built long before the case was brought. It was built with private funds contributed by the Moses H. Cone estate, and some funds derived under the Hill-Burton Act. At the time the Hill-Burton Act specified that nothing in the act could be construed to prevent segregation in hospitals.

I think it was also very much merited in his contention that there was no State action involved. They had to stretch State action a pretty long ways to get it. That is all I have.

Senator THURMOND. Mr. Chairman, could I make inquiry?

I have no questions of these witnesses, but I want to inquire at what time are we going to recess for lunch and at what time are we going to come back?

Senator ERVIN. We will come back at 2:30.

Senator HART. I have only a brief comment.

Senator ERVIN. I was just going to ask the unanimous consent of the committee that I can put into the record my analysis of the *Green* v. *New Kent County*, and a very illuminating editorial on that and also the *Brewer* case that appeared in the Washington Star at that time.

(The analysis and editorial referred to appear in the appendix.)

Senator BAYH. Mr. Chairman, may I extend the inquiry of the Senator from North Carolina? I think we as the committee, particularly some of us who have spent a good bit of time asking questions and perhaps interpreting answers on one side or the other in this case, have been criticized a bit that we are dragging out the hearings. I do not think this to be the case, but I do feel that we are sort of under the crunch of time, and if the committee is of a mind to and has no objection, I would be perfectly glad to sit over the lunch hour and bring in the next witnesses so that we can continue this.

There has been this deadline of a court session; if we can meet that, fine. If not, fine. But I would like to do everything that we can to meet it.

Senator ERVIN. I have been trying to reduce my weight, but I do not believe I would agree to that proposition.

Senator BAYH. In other words, we are going to recess?

Senator HART. Before we recess, so as not to hold the witnesses unless others have more extensive questioning, I think I have a very brief comment.

Senator HRUSKA. You mean to continue by yourself?

Senator BAYH. Or with anybody else who wants to sit here.

Senator ERVIN. Because if such a person as myself is finished, why that gives a little hope that we are finished within a reasonable time.

Senator BAYH. Mr. Chairman, may I make a suggestion to the Chair. Our reporter has been stalwart and kept pace with every word. Perhaps those of us who have questions for Mr. Rauh and Mr. Mitchell could

proceed before the recess, and we will do our best to keep it brief and succinct, of course; that is always the case with the members of the committee, and then ask for a recess until 1:30, which will give us hopefully at least a half hour or better in which the reporter could get a sandwich, and then come back at 1:30 instead of 2:30 to try to speed this up.

Senator ERVIN. I do not believe we will have witnesses.

Senator HART. At 2:30 Congressman Conyers is scheduled.

Senator HRUSKA. Mr. Chairman, I ask unanimous consent to submit for the record a statement, a memorandum on Judge Haynsworth's civil rights cases.

(The memorandum submitted by Senator Hruska follows:)

MEMORANDUM SUBMITTED BY SENATOR HRUSKA

JUDGE HAYNSWORTH'S CIVIL RIGHTS CASES

Opponents of Judge Haynsworth point to a number of the following decisions in which he was reversed as evidence of a civil rights position out of tune with the Supreme Court:

1. *Griffin* v. *Board of Supervisors of Prince Edward County*, 322 F. 2d 332 (4 Cir. 1963), *Rev'd*, 377 U.S. 218 (1964).

Faced with an order to desegrate, Prince Edward County closed its public schools. A foundation was formed for the purpose of running private schools for whites only.

This case was an action to compel the county officials to reopen the public schools and operate them on a desegregated basis. Judge Haynsworth wrote for a majority of the Fourth Circuit that closing of schools to avoid integration was not in violation of the Federal Constitution. He stated further that the county's action might violate state law, but that a state court should pass on the complex issues presented in the first instance.

The Supreme Court reversed Judge Haynsworth's abstention order, holding that closing of Prince Edward County's schools while those in other counties remained open denied students in Prince Edward County equal protection of the laws. The rationale of the Court was that public officials of a county may not operate a segregated system of private schools which benefit directly or indirectly from state funds, because the purpose of the arrangement is to perpetuate racial segregation.

Comments

Judge Haynsworth erred, according to the Supreme Court, in holding that the county could close its public schools entirely, regardless of its motivation for so doing. His view was that the Constitution prohibited a county from discriminating in its public schools, but did not require the county to furnish public schooling. He thought the issue presented was controlled by the court's decision in *Tonkins* v. *City of Greensboro*, 276 F. 2d 890 (4 Cir. 1960), which held that a city could sell a public swimming pool to private parties in order to avoid desegregation of the facility. *Tonkins* was a per curiam decision joined in by Chief Judge Sobeloff, Judge Soper, and Judge Haynsworth. His reliance on *Tonkins*, while incorrect in the Supreme Court's view, is not indefensible.

2. *Bradley* v. *School Bd. of City of Richmond, Va.*, 345 F. 2d 319 (4 Cir. 1965), *Rev'd*, 382 U.S. 103 (1965).

The point on which Judge Haynsworth was reversed in this case concerned integration of faculties. The District Court had failed to take evidence on the question, and Judge Haynsworth held that the plaintiffs, in view of the silent record, had not sustained the burden of showing a violation of constitutional right in regard to faculty segregation. Judge Haynsworth indicated that the District Court would have considerable discretion as to whether and when hearings on the issue would be had.

The Supreme Court reversed, holding that the plaintiffs were entitled to immediate hearings on the issue. The Supreme Court pointed out that no reason for further postponement had been shown.

Comment

Judge Haynsworth was not in error for observing a need for a hearing on the question of faculty desegregation on the record before him. The error seems to have been the failure to order an immediate hearing. Judge Haynsworth's most recent pronouncements indicate that he is adhering to the *Green* decision's command that desegregation plans "promise to work realistically now." This decision therefore should not be permitted to weigh heavily against him.

3. *Bowman* v. *County School Board*, 382 F. 2d 326 (4 Cir. 1967), *Rev'd*, 391 U.S. 430 (1968).

Judge Haynsworth upheld a "freedom of choice" plan where every Negro student had an unrestricted right to attend any school in the system. In so holding, he implicitly relied on a 1955 dictum by Judge Parker to the effect that the Constitution forbids discrimination, but does not require integration.

The Supreme Court reversed, holding that a freedom of choice plan is constitutionally valid only if it promises to eliminate the dual nature of a school system.

Comment

The Supreme Court had never laid Judge Parker's dictum to rest prior to this decision in May, 1968. This was the first time the Court stated unequivocally that the Constitution does indeed require integration. Judge Haynsworth should not be faulted for adhering to the not unreasonable belief that a truly free choice satisfies the Fourteenth Amendment.[1]

Moreover, another facet of the decision demonstrates Judge Haynsworth's willingness to follow the decisions of the Supreme Court in this area. A question of faculty desegregation was involved, and Judge Haynsworth cited the Supreme Court's decision in *Bradley* (in which he had been reversed) as the controlling law on the point.

The following school related cases have also been mentioned by Judge Haynsworth's opponents. Some of these furnish no basis for an attack on Judge Haynsworth; in fact they provide valuable rebuttal material. They are listed alphabetically.

1. *Dillard* v. *School Board of the City of Charlottesville*, 308 F. 2d 920 (4 Cir. 1962), *cert. denied*, 374 U.S. 827 (1963).

In this case, a majority of the Fourth Circuit held unconstitutional a transfer device permitting children to transfer from schools in which they are in the minority. Students in the majority were not permitted to transfer.

Judge Haynsworth dissented on the ground that broader discretion should be allowed the school boards during the transitional period in the process of desegragation. He expressed the view that a Board's order should not be upset unless there is a finding that its action was unreasonable in light of all the circumstances. There being no such finding in this case, Judge Haynsworth registered his dissent.

The Supreme Court held transfer devices such as those involved here to be unconstitutional in *Goss* v. *Board of Education*, 373 U.S. 683 (1963).

Comment

This is one of the cases repeatedly mentioned as evincing Judge Haynsworth's patience with reluctant school boards. Notwithstanding this interpretation, his call for an examination of the Board's action in light of the surrounding circumstances seems not unreasonable.

2. *Franklin* v. *County School Board of Giles County*, 360 F. 2d 325 (4 Cir. 1966).

In this case, Judge Bell wrote for a *unanimous* court. The holding was that a number of Negro teachers had been discriminatorily discharged and were entitled to reemployment when vacancies occurred.

Comment

The court's failure to require the Board to displace teachers already in the system in order to afford the ousted Negroes immediate reinstatement is said to be evidence of an anti-Negro position. If this is true of Judge Haynsworth who concurred, it should be equally true of Judge Bell who wrote the opinion and

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[1] In *Coppedge* v. *Franklin County Bd. of Education*, 394 F. 2d 410 (4 Cir. 1968), Judge Haynsworth wrote for the court striking down a freedom of choice plan where the Board had done nothing to stop the violence being caused by the Ku Klux Klan and others. Since the choice was not really free, the plan was constitutionally defective.

Judge Sobeloff who also concurred. It is doubtful, however, that either of those judges would ever be challenged as improperly motivated in race cases. It is difficult to see how Judge Haynsworth's agreement with them in this case can be transformed into evidence of anti-Negro leanings.

3. *Griffin* v. *County School Board*, 363 F. 2d 206 (4 Cir. 1966), *cert. denied*, 385 U.S. 960 (1966).

This case involved contempt citations by the Court of Appeals against officials of Prince Edward County. The controversy arose as a result of a secret meeting by those officials for the purpose of distributing funds to the white children in the private schools. An appeal was then pending before the Court of Appeals on the legality of such distributions. A majority of the Fourth Circuit court held the officials guilty of contempt despite the fact that no formal order prohibiting the distributions had been issued by the court.

Judge Haynsworth dissented. While agreeing with the majority that the officials' actions had been unconscionable, he concluded that 18 U.S.C. § 401(3), the contempt statute, was to be construed strictly and that, so construed, no basis for a finding of contempt existed.

Comment

Judge Haynsworth's opinion is carefully reasoned. He points out the need for strict interpretation in regard to jurisdictional statutes and relies on an early Fourth Circuit case construing the statute in a manner consistent with his position. After describing the case, he accurately observes that a number of other Circuits had adopted the reasoning of that case. Judge Haynsworth's opinion, properly viewed, does not evidence an anti-civil rights position. Instead, it illustrates an adherence to careful statutory construction and a respect for the proper role of the judiciary in the scheme created by Congress.

4. *Jones* v. *School Board of the City of Alexandria*, 278 F. 2d 72 (4 Cir. 1960).

In this case, the local board had rejected, on grounds of residence or academic deficiency, applications of black students for transfers to white schools. In a per curiam opinion, the court upheld the board's action. Pointing out that criteria such as residency and academic qualifications were constitutionally valid if not employed as a subterfuge for denying persons their constitutional rights, the court found a lack of evidence in the record that they were not being used in good faith in the present instance.

Comment

Here again Judge Haynsworth was in agreement with Judges Sobeloff and Bell. The court's assumption that the board was acting in good faith is attacked by Judge Haynsworth's opponents. It seems not unreasonable to make this assumption where, as here, there is not a shred of evidence to suggest bad faith.

5. *Hawkins* v. *North Carolina Dental Society*, 355 F. 2d 718 (4 Cir. 1966).

This is a decision authored by Judge Haynsworth for a unanimous Court. In question were the racially exclusive practices of the defendant society. The court's holding was that the society was involved in "state action" and that its practices were unconstitutional. Desegregation was ordered.

Comment

Judge Haynsworth's opinion is an eloquent statement of relevant constitutional principles. The desegregation order is firm evidence of his resolve to end racial discrimination.

6. *North Carolina Teachers Assoc.* v. *Asheboro City, Bd. of Education*, 393 F. 2d 736 (4 Cir. 1968).

Judge Haynsworth joined in an opinion holding that a number of Negro teachers displaced during initial stages of desegregation were denied their constitutional rights. The court's ruling was based on the Board's failure to come forth with satisfactory reasons for its decision not to rehire the plaintiff teachers. The rule applied was that a long history of racial discrimination imposes a burden on the Board to show by clear and convincing evidence that its action was not discriminatory.

Comment

Judge Haynsworth joined in the application of the principle that a presumption of racial discrimination arises where a history of discrimination is shown. This

is a rule in tune with reality demonstrating sympathy for the plight of those that have long suffered the harmful effects of discrimination.

7. *Wheeler* v. *Durham City Bd. of Educ.*, 309 F. 2d 630 (4 Cir. 1961).

This was a unanimous en banc decision authored by Judge Sobeloff. The District Court had found the Board derelict in its constitutional duties, but ordered only that the Board report to the court whatever corrective action it undertook. The Fourth Circuit reversed, granting the Negro plaintiffs admission to the schools to which they had applied.

Comment

This case represents a pro-civil-rights position. It is difficult to understand how Judge Haynsworth can be faulted for joining in a unanimous decision against the Board written by Judge Sobeloff, unless Judge Sobeloff is himself under attack for the manner in which the opinion was prepared.

8. The so-called "health facility" cases were argued by Judge Haynsworth's opponents to indicate lack of concern for racial minorities. They are summarized below.

The first of these cases was *Eaton* v. *Bd. of Managers of James Walker Memorial Hosp.*, 261 F. 2d 521 (4 Cir. 1958) in which the Fourth Circuit held that a private hospital could discriminate against black physicians, there being no "state action" present.

9. The next case was *Simkins* v. *Moses Cone Memorial Hosp.*, 323 F. 2d 959 (4 Cir. 1953), *cert. denied*, 376 U.S. 938 (1964). Here, a majority of the court held that a hospital receiving Hill-Burton funds could not discriminate. The rationale of the court was that the Supreme Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) had undermined *Eaton*.

Judge Haynsworth dissented in a carefully reasoned opinion. He took the position that *Burton* had not cast doubt upon *Eaton* and that *Eaton* was controlling. He cited decisions of the Supreme Court of Appeals of Virginia and two district courts for the proposition that receipt of Hill-Burton funds doesn't cause a private hospital to become involved in "state action." These were the only cases which had considered the point. Also influential in Judge Haynsworth's mind was the fact that Congress was then considering an amendment to the Hill-Burton Act which would have the effect of prohibiting discrimination by facilities receiving Hill-Burton funds. If Congress had already barred such discrimination, as the majority had held, Judge Haynsworth reasoned such an amendment would be unnecessary.

Comment

Judge Haynsworth's dissent is highly persuasive. He cites Fourth Circuit law squarely in point and refers to the decisions of other courts reaching the result for which he is contending. To ascribe to this decision an anti-Negro design seems wholly unwarranted.

10. The next case is *Eaton* v. *Grubbs*, 329 F. 2d 210 (4 Cir. 1964) which involved the same hospital as the first *Eaton* case. In a special concurrence, Judge Haynsworth joined in the court's decision that the hospital could not discriminate. Expressing the belief that the views he had stated in his *Simkins* dissent were correct, he nevertheless concurrent because he realized that it was his duty to accept *Simkins* as binding upon him.

Comment

This case illustrates Judge Haynsworth's commitment to the principle of stare decisis. Although he seriously questioned the soundness of *Simkin*, he recognized its binding nature and found it controlling on the issue presented.

OTHER CIVIL RIGHTS DECISIONS TO WHICH OPPONENTS HAVE DRAWN ATTENTION

11. *Dawley* v. *City of Norfolk*, 260 F. 2d 647 (4 Cir. 1958).

Per curiam joined in by Judge Haynsworth held federal district court could properly refuse to exercise its equity jurisdiction in favor of plaintiff seeking injunction against *state* courthouse having racial signs marking public rest rooms.

Comment

This ruling evidences no anti-Negro animus; the two judges who joined with Judge Haynsworth in this opinion were Judges Sobeloff and Soper.

12. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4 Cir. 1959).

Judge Soper, writing for the court, held that discrimination by a private restaurant does not violate the Fourteenth Amendment. Judges Haynsworth and Sobeloff joined.

Comment

A majority of the Supreme Court has never held to the contrary.

13. *Slack* v. *Atlantic White Tower*, 284 F. 2d 746 (4 Cir. 1960).

This case raised the same issue as *Williams*. Judge Sobeloff wrote for the court, and Judges Haynsworth and Boreman concurred.

RECENT DECISIONS

Judge Haynsworth's recent votes in discrimination cases indicate an increasing impatience with those who would deny others rights secured by the Constitution and the Civil Rights Act.

14. *Wooten* v. *Moore*, 400 F. 2d 239 (4 Cir. 1968).

In this case, Judge Haynsworth joined in an opinion by Judge Butyner holding a restaurant subject to the 1964 Civil Rights Act. The court rejected claims that the restaurant did not offer to serve interstate travelers and did not have a substantial effect on commerce.

15. *Coppedge* v. *Franklin County Bd.*, 404 F. 2d 1177 (4 Cir. 1968).

Judge Haynsworth wrote for the Fourth Circuit sitting en banc in this school case. He ruled that the appeal by the local board was frivolous and that the plaintiffs were entitled to an award for costs which would include reasonable attorney fees.

16 *Felder* v. *Harnett County Bd. of Educ.*, ——F. 2d —— (4 Cir. 4/22/69).

Judge Craven wrote for a majority of the court sitting en banc in this recent school case. Judge Haynsworth concurred in Judge Craven's opinion affirming the District Court's decision that a plan submitted by the Board was constitutionally inadequate because its effects on segregation had not been determined. The District Court's order that the Board furnish a plan that promised realistically to work was affirmed.

Senator HART. Mr. Chairman, I have one very brief comment. I want to thank Mr. Mitchell and Mr. Rauh for presenting to this committee as thoughtful testimony as I recall our having received in connection with any judicial nomination.

I think their analysis of the cases will enable every Member, not only of the committee but of the Senate, to answer the question—What kind of man is proposed to sit on the Court, measured against his attitude with respect to what is probably the most serious domestic question we have?

In agreeing with Mr. Rauh's analysis of Judge Haynsworth's opinions, I am not surprised that he would be critical of Judge Haynsworth. What would you expect is really the obvious answer.

If I were a fifth-generation white South Carolinian lawyer, I would be amazed if I would have gone any further than Judge Haynsworth. I am sure that our able colleague from South Carolina, Senator Thurmond, would be in accord with Judge Haynsworth.

The question is—is that the kind of system that at this moment in history we want to advise and consent to? I think that is the top question to resolve among those that most compel an answer, and it is for that reason that I am grateful that you did present in the fashion you have the analysis which you just gave.

Mr. MITCHELL. Senator Hart, I would like to thank you for your gracious manner, which is the way you always are.

I would just like to amend my testimony with this item that has a bearing on what you have just said. Judge Haynsworth is a member of the Commonwealth Club in Richmond, Va., which is one of the longstanding symbols of racial segregation. Recently some Negro members of the Virginia Legislature were not permitted to go into that club to a function which was supposed to be open to members of the legislature.

There was a tremendous uproar about it. I do not quarrel with anyone's right to join any kind of club that he wants to join, but it does seem to me unusual that there would be listed in "Who's Who," the current edition of which I have, I think that is 1968, that Judge Haynsworth is a member of that club.

Ordinarily "Who's Who" includes information which the person whose name is listed wants in there. It is impossible for me to see how anyone who would publish to the world the fact that he is a member of a club which is so segregation prone that it cannot even let a Negro member of the legislature come in, it is impossible for me to see how he could look at a case involving Negro rights with the same detachment and objectivity that you would expect of a man who would at least resign from that kind of club when he was being considered either as a Federal judge or as a member of the Supreme Court.

Senator HART. I noticed a Knight newspaper story that suggested an embarrassment to Judge Sobeloff on occasions luncheon meetings were proposed for members of that fourth circuit in connection with practices of that same club. I have no knowledge beyond the newspaper stories.

Well, I would have nothing further to say. I think that the movement for racial equality in this country has been encouraged by the attitude and the position of the Supreme Court in these recent years.

The able Acting Chairman has thought the Supreme Court to have acted unwisely during that period.

Senator ERVIN. Not altogether.

Senator HART. In areas identified in the many years we have had in this committee. I would suggest that Judge Haynsworth, if he had been on the Supreme Court and joined by half a dozen like him, would have been writing opinions that Senator Ervin did approve of.

Senator ERVIN. He has written many of which I disapprove.

Senator HART. And he would not have contributed toward an easing of tensions in this Nation.

Senator BAYH. Very briefly. Mr. Rauh, because I do appreciate the succinctness and particularly that you have brought to these cases.

I look forward to reading Senator Ervin's opinion and his interpretation of the *Green* case.

I think so far we have had a great deal of accusation, with casual treatment of the judge's philosophical position, much as you point out in the analysis of the brief not quite accurate.

I think if we get all of the facts out on the table then the committee can make a better decision.

Let me ask you this. Frankly the accusation that Judge Haynsworth is a segregationist, is it possible for someone to be less than a segregationist and still not to have the attitude, the philosophy, that is needed is within the realm of practicality. In other words, almost no judgement?

Mr. RAUH. I think that is a possibility. I think, however, that the appointment of an admitted segregationist is not within the realm of practicality. In other words, almost no judge in America today says "I am a segregationist."

Judge Cox, for example, one of the worst judges in the South, uses in public the term "nigger." Now I do not suppose he is going to get appointed to the Supreme Court. The question is whether what I now consider the most dangerous of people, those who want to hold back integration, who want to hold on to the vestiges of segregation as long as they can, who want to make no wrench with the past—that is my definition of a segregationist—are within the realm of practical possibility of appointment.

In other words, I am distinguishing between a Cox and a Haynsworth. But since Judge Cox is no threat to integration—Judge Cox just gets reversed every day—there is no real threat there.

Sometimes he gets tired of getting reversed so he decides right.

But Judge Haynsworth is, I do not know the exact word, I am trying to get it—he is sort of a laundered segregationist.

I started my testimony with that very statement, because I know that some of the Members of the Senate are concerned about looking at individual cases. So I thought it was my job to try to be descriptive, and therefore I defined the term segregationist as best I could.

There are degrees of it. There are degrees between Judge Cox and Judge Haynsworth. I think that the answer to your question, Senator Bayh, is yes, there are degrees. But today to put on the Court one who would try to have the least forward progress possible on integration, the most continuation of past segregation, I think it is not unfair to call such a person a segregationist.

If there were another term I could think of, I would have used it, but it seemed to me segregationist was the proper term for a man who seeks to continue segregation in the present form and for the longest time possible in this country.

In that sense I consider Judge Haynsworth a segregationist.

Senator BAYH. Now you alluded to the earlier reference of Judge Haynsworth that that is not the way now or something to that effect.

Mr. RAUH. Yes, sir.

Senator BAYH. And then you proceeded to bring cases up until 1967–68.

Mr. RAUH. Yes, sir.

Senator BAYH. I wonder if we do not have a broader question in which a judge who is sitting now, whether he is right today or a year ago, is interpreting with all of his background, his educational experiences, his biases or lack thereof, what the Supreme Court of the United States has said is the law of the land in trying to apply that to new cases, new situations. The judgment this committee has to make is really not how Judge Haynsworth will apply Supreme Court law in these situations but how he, himself, as a sitting Supreme Court judge, will lay down an opinion that will in effect be interpreted by all other Federal judiciary members. It seems to me we really have to ask him to meet a higher test than that of applying Supreme Court law to situations that come before him as an appellate court judge?

Mr. RAUH. I think that is right, Senator. He ought to have had a higher standard. He has not, however, even met the standard of apply-

ing Supreme Court law. Wilmington Parking had come down before Moses Cone. The *Brown* decision clearly covered the Charlottesville school situation. Prince Edward County was already under a decree that he could have applied. You could go on through each of these cases and see that he has not even met the first standard of following the Supreme Court decisions in civil rights cases. Therefore he is miles away from meeting the second standard that you have put forward.

Senator BAYH. Thank you for letting us have your thoughts, both of you gentlemen.

Senator BURDICK. Mr. Chairman, I want to thank you for the analysis you have made in these cases, too, today. Just a question or two.

As I understand it, the *Green* case came down 4 days before the *Brewer* case was announced?

Mr. RAUH. Yes, sir.

Senator BURDICK. And in the *Brewer* case Judge Haynsworth had written a minority opinion?

Mr. RAUH. Yes, sir.

Senator BURDICK. Now the points involved in the *Green* case and the *Brewer* case, were they identical?

Mr. RAUH. No, sir, they were not. The *Green* case was a clear freedom-of-choice case. The *Brewer* case is a much more complicated case because it involved all aspects of the latest of several different Norfolk school board proposals, and this proposal was found bad in certain respects. It was found all right in other respects. And the point for which I bring forth *Brewer* is that Judge Haynsworth put himself back with freedom of choice 4 days afterwards and then gratuitously puts in a footnote it was prepared ahead of time.

Every day judges are rewriting their opinions. You got into this to a degree in the *Brunswick* case. When does a case become final? It certainly does not become final until it is issued publicly. Obviously some time between May 27 last year and May 31 Judge Haynsworth put that footnote on the printed opinion that he had written it ahead of time. But to bring down an opinion contrary to what the Supreme Court has said seemed to me to show the degree of his determination for segregation, against integration, for slowing it down. The degree of his segregationism is shown by his reluctance even to change his words in favor of freedom of choice after the Supreme Court had really broken up freedom of choice.

Senator BURDICK. That is my point. It is your contention that the *Green* case at that point was absolutely controlling?

Mr. RAUH. Oh, there is nothing left of freedom of choice except some theoretical use of it, that is of legal use of it. The Supreme Court was saying you have to dismantle segregated school systems. Wherever freedom of choice works against dismantling, it is no good. The only reason for freedom of choice is to work against dismantling segregation.

Freedom of choice is a lineal descendant of massive resistance, of transfers, of closing schools. It is the last in a long line of methods of keeping the dual school system in effect, and the Supreme Court said you may not have freedom of choice wherever you have either the purpose or effect of keeping a dual system in effect, and that is exactly what freedom of choice does.

Senator BURDICK. In your opinion would not the normal practice where a judge had notice of a decision 4 days earlier to have asked for time to rewrite?

Mr. RAUH. I would have thought so, yes. The Supreme Court, as no one has to be told, is the controlling body. I would think there is a certain something—I don't want to use the word contempt—for the Supreme Court in letting the opinion come down. There is certainly a lack of consideration for the Supreme Court in letting that opinion come down afterward.

After all, there are, sir, in the chain of decisions in this country right now, hundreds of opinions. I can give a better example. Suppose you are in January or February. There will be hundreds of cases in the chain of decision where the courts of appeal will be writing or they will have heard the argument or they will have the opinions about ready to go. I am sure that they read the Supreme Court decisions after they come down, and if they affect anything in the pending opinions they start with their pencils to change it. In other words, the opinion is final only when issued. Judge Haynsworth felt enough about this point to put in the footnote. In other words, Judge Haynsworth obviously gave this serious consideration, but he wanted people to know he stood with freedom of choice, so he let his opinion come down with that footnote. He did not want anybody to think he had not read *Green*.

Senator BURDICK. Thank you.

Senator BAYH. There has been a great deal of emphasis placed on that footnote and the timing of the Supreme Court's decision. I just would like to ask this. Do we know if the Supreme Court case had already gone to the printer or the other case had gone to the printer?

Mr. RAUH. You mean in *Brunswick*?

Senator BAYH. No.

Mr. RAUH. I did not understand, sir.

Senator BAYH. In the *Green* case, the footnote in the *Green* case.

Mr. RAUH. The *Green* case must have gone to the printer considerably before that, because it was actually published on the 27th.

Senator BAYH. The *Green* and the *Brewer* case?

Mr. RAUH. Oh, the *Brewer* case.

Senator BAYH. The *Brewer* case may have gone?

Mr. RAUH. I think it would go to the printer, but I have no idea, sir; whether it had gone to the printer or not.

Senator BAYH. Is that footnote such a significant factor inasmuch as the judge did even after a long history of deliberation on a number of these cases still put the gratutitous emphasis on the right of freedom of choice in the dissent?

Mr. RAUH. Sir, all I would say is that the footnote demonstrates that he could have changed the opinion. If there was plenty of time to put in a footnote, there was plenty of time to change the opinion if he wanted to do it. He obviously did not want to change his position on freedom of choice even after *Green*. I think of all the issues before us today in the effort to integrate the schools, freedom of choice up until *Green* was the most dangerous because it was an effort to keep segregation and to keep the dual school system.

Senator ERVIN. Senator Thurmond?

Senator THURMOND. I have no questions, thank you.

Senator ERVIN. Senator Mathias?

Senator MATHIAS. Thank you, Mr. Chairman.

I would like to issue a personal word of welcome to Mr. Mitchell and Mr. Rauh, and to thank them for their appearance here today and for the testimony they have given.

I would like, very briefly, to ask for comment on a couple of the parts of this narrative as it is unfolding.

When Judge Haynsworth was before us a day or two ago, I read into the record by way of questions to him a number of decisions, six or eight, which he had participated in, in which he had voted with the majority and which held on what I think all of us would agree was the civil rights side.

In your statement here today you have outlined cases where he held in the other direction, and in fact at one point in your statement you say that he has paid only lip service to desegregation. Without tediously reviewing the names and citations, the golf course case, several cases in Charleston, would you agree that he did vote with the majority in favor of the causes that all of us have shared in promoting a greater degree of civil rights for all Americans?

Mr. RAUH. I would say that Judge Haynsworth voted on the civil rights side only in those cases where there was no possible other position. You mentioned the golf course case. That is not a civil rights case. In the golf course case they reduced the time for integration from 8 to 6 months. I think I mentioned that, sir, before. I can go through these cases that have been listed. There is not one of them that a reasonable man could have decided the other way.

Senator MATHIAS. Under the precedents that existed?

Mr. RAUH. Under the precedents that existed. You see I have a longer list than the one that Senator Ervin put in, because that is the list of the law clerks. That is the brief for Judge Haynsworth. I went through that list and I read every one of those cases. There are only three that are not unanimous, and in two of those three he was on the anti-civil-rights side. It was a very poor job of compilation, because they put cases in where Sobeloff or another judge had had to go farther than he did. There was no case in there where there was any reasonable possibility of taking the other side.

Let me just tell you what some of these were if you want to hear them.

Senator MATHIAS. To boil it down, your position really is that Judge Haynsworth has applied the law where the law was binding and where there was no discretion?

Mr. RAUH. Oh, no; that is not my position, Senator Mathias. My position is that he has refused to apply the law in important civil rights cases; that it is only when one would have been ridiculous to take the other position that Judge Haynsworth went with the majority there. The only two he wrote apparently were *Coppedge* and *Hawkins*. *Coppedge*—I do not think you were in the room when I mentioned this—was a freedom-of-choice case where they were shooting at the Negroes and he said, "That is bad." Really, what possible thing could you say about that? The other one he wrote was that the North Caro-

lina Dental Society in 1966 had to admit a Negro. By that time there had been enough cases of medical associations that you could not possibly have done anything else. No; I say he did not apply the law of the land in the cases.

Senator MATHIAS. Even where the law was clear?

Mr. RAUH. I say the law was perfectly clear in *Moses Cone Hospital*, in *Griffin*, in *Charlottesville*, in *Brewer*. The law was clear in many of these cases. And of course you know, sir, that this study of the Library of Congress, which is not an attack on Judge Haynsworth, demonstrates that not only is he in the minority of his circuit, not only did Judge Sobeloff and the others like Judge Bell, wonderful liberal judges, disagree with him, but the fifth circuit, coming from the Deepest South, the fifth circuit has been much more liberal. This is not against southern judges, there are wonderful southern judges—Tuttle, Brown, Wisdom, Johnson—who would have been heroic additions to the Court.

The suggestion is sometimes kind of intimated that somebody is against southern judges. I could stand and cheer for one of the ones I have mentioned.

Senator MATHIAS. I would agree and I think the South as every part of the country has the right to be represented on the Supreme Court.

Mr. RAUH. Sure, but the fourth circuit did not live up to the principles of the fifth circuit, you see. The fourth circuit has been much farther behind Brown than the fifth circuit. The fifth circuit has been *really fine*.

Mr. MITCHELL. You know, Senator Mathias, you and I will remember that in a situation that arose in the State of Maryland, there was a young city attorney who had the courage in the face of a hostile situation to reach a decision which was the right and lawful decision, even though that did not necessarily mean he could win a popularity contest, and you, sir, happened to be that young State attorney, now a Senator.

I think this is what we expect of Supreme Court Justices. I think we expect of Supreme Court Justices that they will have the courage in a situation where the law required it to rule in a way that proves justice is indeed blind in this country.

I think there are many men like yourself and some members of this committee who can do that. On balance, after reading Judge Haynsworth's decisions, and talking with great constitutional lawyers like Mr. Rauh and others who have helped in the understanding of those decisions, I cannot believe that Judge Haynsworth would bring that degree of objectivity to the Court which would enable him, when looking at a colored man and a white man, to fail to take note of their color, fail to take note of the customs out of which the case arose, and it is my opinion on the basis of his record that if we were successful in getting a favorable decision from him, it would be because the law is so overwhelmingly on our side that, as Mr. Rauh has pointed out, it would be ridiculous to decide otherwise.

Senator MATHIAS. That was really the nature of my question. You

felt that only under those circumstances in your judgment would Judge Haynsworth side with the civil rights position, but that wherein he was allowed the judicial discretion, where it was a case of first impression——

Mr. RAUH. I am not going to go that far with you, Senator. The cases where he went wrong were not cases of first impression. There were cases that he went wrong on which were very obvious.

Judge Sobeloff said the *Moses Cone Hospital* case is controlled by *Wilmington Parking*, which it was, and he would not go along with that.

The *Brown* case clearly controlled *Charlottesville*, because they used racial grounds for transfers. Brown was clear that that was bad, but he went and dissented there.

The *Griffin* case—you could have used the decree of that very case to stop what was going on in Prince Edward County, and yet he found some way out through abstention.

No; I am not prepared to say that he has only gone wrong where it was first impression. He has gone wrong where it was third and fourth impression.

Senator MATHIAS. Of course, you use very powerful authority with me when you quote Judge Sobeloff, because he is an impressive judge. He has tremendous perception, depth of knowledge, and Mr. Mitchell shares with me great pride in having Judge Sobeloff on the bench.

Mr. RAUH. In each of the cases I mentioned, sir—I am looking hurriedly—but I believe it is fair to say that if Judge Sobeloff sat at all he was on the other side.

I think my statement is correct, that in the seven cases I used this morning to demonstrate my belief that Judge Haynsworth is a segregationist, if Judge Sobeloff was in the case he was always differing.

Senator MATHIAS. Always differing?

Mr. RAUH. I listed seven cases, and in each of those—I am trying to think quickly about them—Judge Sobeloff and he disagreed in each of the cases in which they both sat.

Senator MATHIAS. At the outset of your testimony I believe you briefly adverted to the ethics question.

Mr. RAUH. No; I did not, sir.

I am willing to answer any question as a lawyer.

Senator MATHIAS. I will ask you do you have, as a lawyer yourself, as an officer of the court, do you have any views you wish to give to the committee on that?

Mr. RAUH. I guess everybody is hungry and it is a little late to give a lecture on that subject.

I could not speak for the Leadership Conference on a subject beyond civil rights.

The Leadership Conference is here to ask the Senate not to confirm Judge Haynsworth on civil rights.

My own personal point of view would have to be this. Speaking now for myself as a lawyer. I think Judge Haynsworth has been insensitive to ethical concepts both in the *Brunswick* case and even more so in the textile case. I think Judge Haynsworth should not have

bought the stock in the *Brunswick* case. He should not have sat on *Darlington*.

I think it is the same insensitivity he has to civil rights. I think that men are sensitive or insensitive to problems, and that a man who is insensitive to an ethical problem would also be insensitive to the right of a Negro. I do not know anything about what is in Judge Haynsworth's heart. I am not there. But I do know that his record appears to be that of a man who feels insentitive to anything except what is good for himself, andI think that is not the kind of a man who has demonstrated the ethical concepts to go on the highest bench.

But here I have to repeat that I do not want to go beyond the scope——

Senator MATHIAS. I did not ask you in your representative capacity. I asked you as a lawyer and an officer of the court.

Mr. RAUH. Thank you, sir.

Senator MATHIAS. Thank you very much, Mr. Chairman.

Senator ERVIN. Mr. Mitchell, I was reliably informed that several members of the present Supreme Court belong to clubs in Washington which confine their membership to members of the Caucasian race. Do you think they ought to be impeached?

Mr. MITCHELL. I do not think they ought to be impeached, Senator Ervin, but I think they have a duty to resign. I would say——

Senator ERVIN. They have not.

Mr. MITCHELL. No, they have not, but this is the point I have been struggling with in my sitting here and listening to the whole presentation. The utter impossibility of getting across to even sympathetic people in white America the concept that Negroes have of individuals who do not practice the doctrines that this country stands for. As I said, I do not quarrel with anybody who joins a club of one kind or another.

Senator ERVIN. I just have the conviction this country thinks that every American of any race ought to be free to join such social organizations as he sees fit to do so.

Mr. MITCHELL. I think that is my view, certainly. I would say the point at which it stops, and this is where I think it is so difficult to get this across to white Americans, the point at which it stops is when one ascends to the Bench, becomes a member of the U.S. Senate, or President of the United States.

It seems to me he then no longer belongs to himself and to his family. If he is a Senator he belongs to all the people of his State. If he is a Supreme Court justice he belongs to the whole country, and if he is President obviously he belongs to the whole country.

At that point it seems to me he should not wish to be identified with anything which exists for the purpose of being open to one racial group only, and I say it does seem to me that the Justices of the Supreme Court who may be members of those clubs, I do not know of my own knowledge that they are, but if they are it seems to me that they have a duty to resign.

I say with some sadness that in my long experience around here, I have found that only a handful of people in official positions of this country are willing to exercise that kind of discretion.

Senator ERVIN. You quoted what John Bolt Culbertson allegedly said to somebody else and I will say what was said to me on this point. He was asked by some member of the NAACP to ascertain whether Judge Haynsworth belonged to any organization which restricted its membership, its members to the Caucasian race and he said, there is a lot of discrimination of that kind. Some white folks have clubs that do not admit black folks. Some Gentiles have clubs that do not admit Jews. Some Jews have clubs that do not admit Gentiles. Some of the black people have clubs that they will not let a white man get in hearing distance of.

Mr. MITCHELL. The point is none of those are candidates for a seat on the Supreme Court.

Senator ERVIN. Not at this point. No. I have listened with very much interest to your presentation and I have come to the conclusion that you gentlemen think, and that the organizations you represent think that we must have integration in this country even if we have to rob everybody of their liberty to get it, and that you do not want anybody on the Supreme Court except the man that will go to that length.

Thank you very much.

Mr. MITCHELL. I would like to say respectfully, Senator, that that certainly is not our position.

Senator ERVIN. That is the inference I brought from your testimony.

Mr. MITCHELL. I do not quarrel with your inference, but it is not a fact.

Senator ERVIN. Mr. Rauh, I find that I have a copy of this letter that I mentioned from the law clerks and to save you the trouble of making a copy of that available I will put this in the record.

We will recess until 2:30.

(Whereupon, at 1:20 the committee recessed, to reconvene at 2:30 on the same day.)

AFTERNOON SESSION

Senator HART. The committee will be in order.

The Chairman, who is delayed, has asked that we resume, and I am delighted to have the assignment at least for the moment which permits me to welcome some distinguished Members of the Congress who are accompanying the very distinguished Congressman from Michigan's First Congressional District, Congressman Conyers, who is scheduled as the principal witness this afternoon, but I hope that Congressman Conyers, when he comes forward and introduces his colleagues, will encourage them to express their opinions about the nomination that is pending.

Mr. CONYERS. Mr. Chairman, would you mind if my colleagues join me here?

Senator HART. I was hoping that they would.

For the record if you will introduce them.

TESTIMONY OF—

HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE FIRST CONGRESSIONAL DISTRICT OF THE STATE OF MICHIGAN

HON. CHARLES C. DIGGS, JR., A REPRESENTATIVE IN CONGRESS FROM THE 13TH CONGRESSIONAL DISTRICT OF THE STATE OF MICHIGAN

HON. SHIRLEY CHISHOLM, A REPRESENTATIVE IN CONGRESS FROM THE 12TH CONGRESSIONAL DISTRICT OF THE STATE OF NEW YORK

HON. LOUIS STOKES, A REPRESENTATIVE IN CONGRESS FROM THE 21ST CONGRESSIONAL DISTRICT OF OHIO

HON. WILLIAM CLAY, A REPRESENTATIVE IN CONGRESS FROM THE FIRST CONGRESSIONAL DISTRICT OF THE STATE OF MISSOURI

Representative CONYERS. This is a double privilege, Mr. Chairman. We did not anticipate that our distinguished Senator from Michigan would be presiding. We are very pleased and honored to come forward to make a joint statement, and I should indicate very clearly that I am very honored to make this statement as a member of the House Judiciary Committee, but that this statement is made in conjunction and with full support of those with me and the following other distinguished members of the House of Representatives: Congressman Adam C. Powell, 18th District, New York; Congressman Robert N. C. Nix, 2d District, Pennsylvania; and Congressman Augustus Hawkins, 21st District, California.

Senator HART. And I most certainly want to welcome the distinguished Representative from our 13th District.

Senator BAYH. What State is he from, Mr. Chairman?

Representative CONYERS. From Michigan, of course, and Congressman Robert Nix of Pennsylvania, who is not with us today, Congresswoman Shirley Chisholm, of course, of New York is here, as is Congressman Bill Clay of Missouri and Congressman Louis Stokes.

Senator HART. Ladies and gentlemen, we do welcome you.

Representative CONYERS. Mr. Chairman and committee, Judge Haynsworth's record on civil rights clearly demonstrates his infidelity to the principles of racial equality, which are contained in the Constitution. In 1954, the Supreme Court held that racially "separate educational facilities are inherently unequal." But, as Mr. Justice Black has recently stated, the effect of *Brown* v. *Board of Education II*, which permitted the implementation of *Brown I* to be undertaken "with all deliberate speed" was to undermine the Court's mandate to integrate the races in public schools.

We submit the Judge Haynsworth has played a very prominent role in the 15 years of frustration and delay which have followed both *Brown* decisions. Time and time again the Supreme Court has had to reverse lower court approval of devices and plans of evasion which

frustrated the school board's obligation to desegregate as contemplated by *Brown*.

We are disappointed with the President's choice of a man whose views have been so often at odds with a Supreme Court which achieved distinction through its attack on the malaise of racial discrimination in this country. While it is perhaps arguable that Judge Haynsworth might consider himself bound by the Court's reversals of his positions, there is little evidence to support this view. And, especially disturbing about this appointment is the potential for mischief that it creates in unsettled areas of law which deeply affect the rights of blacks and other racial minorities.

Here are a few examples of the extent to which Judge Haynsworth is out of step with what the Constitution requires. In *Griffin* v. *Prince Edward School Board*, 377 U.S. 218 (1964), the Court held that the county could not shut down its public school system so as to evade its responsibility to integrate. But Judge Haynsworth was of a different view.

He had previously written that black schoolchildren who were denied public education could not assert a violation of the equal protection clause by such practices (322 F. 2d 332) (1963).

In the *School Board of the City of Charlottesville* v. *Dillard*, 374 U.S. 827 (1963), Judge Haynsworth dissented from a majority opinion which prohibited transfers for children in schools where desegregation was taking place.

Curiously, Judge Haynsworth expressed the view that the "sense of inferiority" which the Court associated with segregation in Brown would be intensified if integration were to be effectuated. Subsequently, however, in *Goss* v. *Board of Education*, 373 U.S. 683 (1963), the Supreme Court said that transfer systems of the kind which Judge Haynsworth had approved in Dillard were inconsistent with Brown.

What Judge Haynsworth did in Dillard was to stand the reason of the Court in Brown on its head. For the Court had said that segregation encouraged feelings of inferiority—but 8 years later, we find Judge Haynsworth saying that it was integration which accomplished the same thing.

Only 2 years ago, in *Bowman* v. *County School Board of Charles City, Virginia*, 382 F. (2d) 326 (1967), Judge Haynsworth propped up the outworn "freedom of choice" approach to public desegregation which the Court has now rejected, where integration of the races is not accomplished.

The Supreme Court has spoken on this matter in *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1969), where it was held that Brown requires that school board procedures accomplish their stated objectives; i.e., integration. This conclusion is in accordance with the views of Judges Sobeloff and Winter, who are colleagues of Judge Haynsworth's in their opinion in these words:

> It is time for this circuit to speak plainly and its District Courts to tell them to require the school boards to get on with their tasks—no longer avoidable or deferrable—to integrate their facilities.

All of this makes it somewhat difficult to understand Judge Haynsworth's contention that his prosegregation opinions were the prevailing judicial view at the time in which they were written.

Another example of Judge Haynsworth's approach to desegregation cases is to be found in *Bradley* v. *School Board of the City of Richmond,, Va.*, 345 F. (2d) 310 (1965), where he held that the reassignment of teachers to accomplish integration of staff had a "speculative" relationship to the constitutional rights of pupils. The Supreme Court specifically rejected this characterization in its reversal of Judge Haynsworth stating that there was "no merit to * * * (this) * * * suggestion".

In *Bradley*, Judge Haynsworth indicatse that he is out of touch with constitutional requirements concerning desegregation of public schools. One must assume that his appointment signals hope to those who have refused to abide by law and orderly judicial process during these long 15 years since *Brown*. His nomination will surely give courage and determination to those school boards which have attempted to evade the Court's pronouncements in *Brown*. And, Judge Haynsworth's appointment is particularly ominous in light of the executive branch's apparent intention to utilize the Courts in desegregation disputes, rather than apply administrative remedies.

But, there are some who say that Judge Haynsworth will change—or even renounce his past commitment, to what must be regarded as an obstructionist position. However, the fact that all of the opinions cited above are extremely recent, casts doubt on this argument.

Moreover, Judge Haynsworth has demonstrated his attachment to his views in the races areas even in the face of contrary rulings by his own colleagues on the Fourth Circuit. This is made clear by his opinions in *Simkins* v. *Moses H. Cone Memorial Hospital*, (323 F. 2d) 959 (1963), and *Eaton* v. *Grubbs*, 329 F(2d) 710 (1964), which both involved the question of whether the 14th amendment's requirement of "State action" is present where a hospital receives Federal subsidies under the Hill-Burton Act.

Judge Haynsworth dissented in both of these cases, indicating in *Eaton* that he was unpersuaded that State action could be found, contrary to the unanimous opinion written by his colleague Judge Sobeloff.

We wish to emphasize the fact that Judge Haynsworth was writing subsequent to the Supreme Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), where the question was whether "State action" could be found in a case involving discrimination by a private party, who was a lessee of (the State). Here is what the Court had to say in that connection:

> By its inaction, * * * the State * * * has not only made itself a party to a refusal of service, but has elected to bring its power, property, and prestige behind the admitted discrimination.

We do not believe that this kind of record bodes well for a sensitive handling by Judge Haynsworth of the most important domestic issues before the Court. In short, we find too much discord between Judge Haynsworth's expressed legal views on desegregation and those of the Supreme Court. It leads us to question his direction in future issues soon coming before the Court in one form or another which will deeply affect blacks and other racial minorities of this country.

Is de facto segregation unconstitutional under the Brown holding? Are the States obligated by the 14th amendment to provide more

funds for ghetto schools than are disbursed for students in all-white areas where children have more opportunities in life?

Does existing civil rights legislation obligate employers and unions to remedy past discrimination against black workers? These are just some of the complex issues requiring careful treatment which will soon be before the Court.

We do not think that Judge Haynsworth's record demonstrates the understanding and qualifications which are necessary prerequisites to the adjudication of such matters.

Finally, it hardly needs to be pointed out that the appointment of a Judge who has rubberstamped the evasions of law, which everyone knows to exist, is particularly unsuitable when we consider that this administration claims a commitment to law and order. What a mockery of law and order it is to appoint Judge Haynsworth, who has so steadfastly undermined the Supreme Court's decrees and thus the people's faith in orderly procedure.

Even more important, we do not think that the irony of this appointment will be lost on black Americans who have been told to use the Courts and legal means for redress of grievances. Judge Haynsworth's confirmation would serve notice that our Government intends to block off the few avenues that are now available for legal attack on the bastions of racism in our country.

For it is the Supreme Court which has given black people a certain measure of faith in the slow moving and creaky legal machinery with which we are afflicted. To impair the Court's ability to deal with racism is to impose strains on the fabric of a society beyond its limits.

We urge you to reject the nomination of Judge Haynsworth. His appointment would hardly be consistent with the Constitution's uncompromising hostility to segregation and inequality. It would unequivocally tell black people that the one significant route for peaceful resolution of society's racial injustices, now open to them, is gradually being phased out.

Senator HART. Congressman, to you and to your colleagues many thanks.

Somehow or another I have a feeling this testimony, which is eloquent, and would be regarded as moving if read by white Americans, ought to have even greater persuasiveness when it comes from you and those who are with you.

I do not suppost that any of us can really say that we speak even for everybody in our own family on most questions that we take a position on, but I suppose if we were to ask who is most likely to be in a position to speak the concern and voice the hope of black Americans it would be black Americans in Congress.

Representative CONYERS. Mr. Chairman, we appreciate that response. Might I ask for purposes of the record that my colleagues here with me today be allowed to file with the committee additional statements that they might want to amplify any of the points made in our joint statement?

Senator HART. The record certainly will be open to receive that.

Before we ask any questions, it may be that one or more of those who accompany you would like now informally to make some comment.

Congressman Stokes?

Representative STOKES. Mr. Chairman, I should just like to say to this august body that it has been a pleasure to appear here today and have the opportunity to join in with this joint statement which was just presented to this committee by Congressman Conyers of Michigan.

As a member of the Ohio Bar, as a member of the Supreme Court Bar, as one who has had the great privilege of arguing in that Court, I have great respect for the U.S. Supreme Court.

If there is any particular section of this joint statement that I should like to amplify, it will be that portion of the statement which makes reference to what this Court must represent for the black people in America.

We are constantly urged to avoid disaster in our streets, to avoid a disruptive process, and we are urged to resort to litigation, to the judicial process. If we are to adhere to these kinds of urgings, in order to acquire first-class citizenship in America for all human beings, it is then imperative that that Court continue to represent the last beacon of hope and faith for black people in America who are willing to resort to that process and that means of acquiring full citizenship in America.

It is therefore imperative that in placing men on that Court, we place men whose record demonstrates that they adhere to the decisions of that Court, that they adhere to the Constitution of the United States, and they in fact have a commitment to the fact that all human beings, all persons in America, irrespective of race, creed, color, form or status, have the Constitution and the judicial decisions that have emanated from that Constitution applied to them equally.

Thank you very much.

Senator HART. Congressman Clay?

Representative CLAY. Yes, Mr. Chairman, and members of the committee, I also wish to express my appreciation for the opportunity to appear before this committee this afternoon.

Those supporting the nomination of Judge Clement Haynsworth to the Supreme Court claim that he has shown great judicial courage. In their opinion his decisions negating the constitutional rights of black Americans attest to that courage. In my opinion courage is an important factor in naming a candidate for the Congressional Medal of Honor, but prudence, intellectual honesty and fairness must be the barometer for measuring the fitness of a nominee for the Supreme Court of the United States.

Those supporting Judge Haynsworth refer to him as a direct interpreter of the Constitution. In language the average American can understand, that means that he is vehemently opposed to the extension of the individual rights of the citizen.

It is quite evident from decisions he has rendered that he is opposed to the extension of full citizenship to black Americans. If we are truly committed to the Bill of Rights and the Declaration of Independence, then it serves no purpose to appoint persons opposed to this ideology to positions on the Supreme Court.

President Nixon has publicly stated that Justices of the Supreme Court should be above reproach. Great questions have been raised concerning Mr. Haynsworth's integrity. The several instances in Judge

Haynsworth's character where conflicts of interest can readily be charged do in my opinion constitute a flagrant violation of judicial ethics.

These charges not only impugn his integrity but question his judgment.

I do not suggest that Judge Haynsworth be placed on the 10 most wanted list, but he certainly does not meet the requirements for inclusion on the nine most qualified justices list.

I strongly suggest to the Republican members and the leadership of the Senate that you request that President Nixon withdraw the name of Clement Haynsworth from consideration as associate justice to the U.S. Supreme Court.

Thank you.

Senator HART. I would be risking great trouble if I did not explicitly invite my colleague Charlie Diggs whose opinion I do know to make sure if there is anything he wants to add.

Representative DIGGS. Thank you, Mr. Chairman.

You have already given unanimous consent for us to revise and extend our remarks. I merely want to say how very strongly I am associated with this document as presented by my distinguished colleague from Michigan and also with supplemental remarks made by the gentleman from Ohio, and as anticipated from the gentleman from Missouri and the gentlewoman from New York and others.

I think the statement that you made in your introductory remarks around the question of who we represent and what we represent in the Congress of the United States has a great deal of significance, because I think it is unprecedented for a group of black members of the House, who number nine now, to come before a committee of either House in a joint statement of this type.

I think it reflects as you reflect and others reflect the kind of feedback that we get from our constituents around the country, constituents that are confined to the congressional districts which we represent, because in truth we are Congressmen at large for the 30 million black people in this country. All of us are the recipients of requests for constituent services. All of us are recipients of requests to serve as instruments to convey thoughts of black Americans to the Congress of the United States, and so when we sit here in this group, and those who are unable to be here, who are associated with this statement sit here as a group, we represent the voice of black America.

Thank you.

Senator HART. Mrs. Chisholm?

Representative CHISHOLM. Mr. Chairman and gentlemen of the committee, I am certainly glad for the opportunity just to make a very few brief remarks, because I think that the statement as presented by Congressman Conyers as well as the supplementary remarks by my colleagues really summed up the total situation when we say that this afternoon we represent the voice of black America.

It seems to me that one of the most important things that we have to look at very carefully is the fact that Mr. Haynsworth, by his past

behavorial actions, and by his attitudes in the past with respect to legal questions involving a large segment of people long denied, postponed and humiliated in this country, is very, very clear evidence that there must be skepticism in terms of his being able to render effective, fair and meaningful judgments that will give these same people the hope that they, too, will one day become a real part of the American system.

We cannot indulge in saying that perhaps his outlook might change, that perhaps his views might change. The hour is already late, and what we have to address ourselves to is that men and women in this country of good will, who sit in judgment on other people's lives, must have the temperament, the understanding in terms of recognizing that America must be the kind of place to embrace all kinds of people in this multifaceted society.

I dare say the more I read about Mr. Haynsworth, and I am not a lawyer, but I have made it my particular business to delve into all kinds of decisions, to delve into all kinds of research, because I have been getting so many statements from across this land from black people concerning what is going to happen to our young people when we have told them that there is a proper way for recourse of action, that you do not have to riot in the streets, that you do not have to destroy life, limb, and property, because there is an instrument in this country that will give us justice.

The Supreme Court of the United States has been the one institution that has given many of us hope when everything else has been lost on the city and the State level, and now at this hour it becomes a real concern of the black citizens of this country that the Supreme Court continues in the tradition that commenced with the famous *Brown* decision back in the 1950's, that it continues to exemplify by its actions and its verdicts that there is concern about justice for all people in this land, and therefore I vehemently oppose the nomination of Mr. Haynsworth to this most important position on the U.S. Supreme Court bench.

Thank you for this opportunity.

Senator HART. Thank you.

The Senator from Indiana, Mr. Bayh.

Senator BAYH. Thank you, Mr. Chairman.

My colleagues from the House, I think it is impressive and significant that you would take time from your busy schedules to speak out on this particular issue. I think it is important because the subject matter to which you address yourselves, and I think your very presence here, not just at this hearing but in this Congress, is evidence that the system is beginning to respond to those who for many years have had no way of expressing themselves.

I could not help but find a striking comparison between what Congressman Conyers' statement and the supplemental remarks had to say and the message that came across loud and clear in the Kerner Commission report. When we went through a devastating period of time and finally decided we had better find out what was the cause of all of this, the Kerner Commission pretty well laid it on the line.

It talked about two nations separate and unequal, and made some rather striking recommendations about what should be done. Then a supplemental report seemed to indicate that we were not making the kind of progress that needed to be made.

It seems as I interpret that statement that this nomination, and the particular problems to which you are sensitive, that this nomination is of a double-barreled threat to further progress: One, the encouragement toward those who have been trying to impede progress; and two, the discouragement of those who have been trying to further progress. If indeed that is to be the impact of the present nominee, I can see why you would be deeply concerned and why we are all deeply concerned. I appreciate your statement.

Senator HART. The Senator from Nebraska, Mr. Hruska.

Senator HRUSKA. Mr. Chairman, I join you in welcoming this delegation here. It is a pleasant experience to see five of the nine members of the House who represent black Americans appearing together as a delegation. It has not been my privilege to have served in the House with any of you. Mr. Chairman, I have served, however, on conference committees with Representative Conyers, and I must say he is a very articulate, a very eloquent and persuasive advocate.

I have no questions of any of the witnesses, Mr. Chairman.

Senator HART. May we conclude, my colleagues, with an expression again of thanks. I repeat, though I think the scene itself will cause all of us to remember, that of all the testimony we have received on this nomination, I think none should be understood more clearly than yours.

The temptation is to push beyond the limits of traditional reserve here, but I do hope, as I know do those on the committe who are not able to be here at the moment, that when they read the record it will be most constructive.

Representative CONYERS. Thank you, Mr. Chairman, we leave this matter in your tender hands.

Senator HART. Our next scheduled witnesses, speaking for the Textile Workers Union of America, is its general president, Mr. William Pollock, and its general counsel, Miss Patricia Eames.

May I suggest that as soon as we have identified you for the record that I ask Senator Bayh to raise with you at this time certain questions that he desires developed for the record. Senator Bayh is required by his schedule to leave very shortly, and I fear if we continue in regular order he would not have the opportunity.

If he is agreeable to that course I suggest it be followed at this time.

Senator BAYH. Mr. Chairman, if it is agreeable with you and our colleague from Nebraska, I would appreciate that.

I have had something come up and I am going to have to leave shortly, and because of the unique position of the Textile Workers Union in this entire case I would like to get some facts into the record, if there is no objection, and if Mr. Pollock and Miss Eames do not mind my raising these questions prior to their statement. I see it is rather lengthy and detailed. Perhaps you have answered them, and if that is the case, why just say that is in the statement and I will read it when I get back.

Do you have any objection if I raise these questions?

TESTIMONY OF WILLIAM POLLOCK, GENERAL PRESIDENT. TEXTILE WORKERS UNION OF AMERICA, AFL–CIO; ACCOMPANIED BY PATRICIA EAMES, GENERAL COUNSEL, AND PAUL SWAITY, VICE PRESIDENT

Mr. POLLOCK. Not at all, Senator.

Senator BAYH. I understand, Miss Eames, you were the lawyer for the Textile Workers, is that correct, at the time of the *Darlington* case?

Miss EAMES. At that time I was assistant general counsel for the Textile Workers. Part of the work on the case was done by me, part of it later was done by Mr. Abramson and other attorneys participating at different times.

Senator BAYH. You are in a rather unique position to speak to the whole matter of the Judge Sobeloff letter.

That letter was, as I recall, the result of an anonymous phone call making certain allegations relative to the nominee that is now before us. It was you who brought this matter to Judge Sobeloff's attention. Then he addressed himself in another letter which ultimately reached the Justice Department.

Would you please tell us, in your opinion, as the party that brought this matter to Judge Sobeloff's attention, what allegation you were pursuing? What matter was concerning you as the lawyer for one of the litigants in that *Deering, Milliken* case?

Miss EAMES. In 1963 at the time this matter originally arose and when I wrote to Judge Sobeloff, the question that I was raising with Judge Sobeloff was the question raised in the anonymous call to me which, as Deering, Milliken's lawyer characterized it, was that the judge will be given a bribe for his decision.

Senator BAYH. In other words, it was a matter of bribery, a criminal charge, as you saw it? What was your opinion after Judge Sobeloff's investigation?

Miss EAMES. After Judge Sobeloff's investigation it was very clear that no bribery had been demonstrated or proven, and that the accusation made by the anonymous telephone caller had most certainly not been proven.

Senator BAYH. There has been some question, and I am sure that all members of the committee do not share the same judgment on the various facts, but there has been some question as to whether the matter of the conflict of interest that would keep the Textile Workers in this particular case from getting a fair unbiased hearing before Judge Haynsworth, was included in the allegation that you raised with Judge Sobeloff. Is that you opinion?

Miss EAMES. It was not raised in the correspondence with Judge Sobeloff.

Senator BAYH. Why did you not include this whole matter in the appeal? Some have criticized the Textile Workers, that if there had been a matter of impropriety as far as Judge Haynsworth's involvement with Carolina Vend-A-Matic and its relationship with Judson Mills, et cetera, et cetera, that this should be raised on appeal. Why didn't you raise that?

Miss EAMES. Most of these facts had been concealed from us. Judge Haynsworth never——

Senator BAYH. Could you tell the committee what facts you were unaware of at that time?

Miss EAMES. Yes. Judge Haynsworth never revealed to us the fact that he owned one-seventh of Carolina Vend-A-Matic. Indeed he did not reveal at any time that he owned any of it. We did not have those facts before us. Neither did we know that Judge Haynsworth had been, before going on the court, and that his former law firm still was, counsel to Deering, Milliken in its Judson subsidiary, nor did we know that when Judge Haynsworth's vending machine company had wanted to retain counsel to incorporate a subsidiary in North Carolina that they had retained Darlington's lawyers, so that the law firm that was one of the law firms arguing for Darlington was in fact Judge Haynsworth's lawyer.

Senator BAYH. What law firm was that?

Miss EAMES. That is the Holderness, Brim law firm.

Senator BAYH. The what?

Senator ERVIN. McLinden, Brim, and Holderness.

Miss EAMES. Holderness and Brooks.

Senator BAYH. Is Brooks the one that says he had never heard of Carolina Vend-A-Matic?

Miss EAMES. Yes.

Senator BAYH. Would you give us the sequence in which the law firm was retained?

Miss EAMES. His three partners were the incorporators of and the original directors of a subsidiary of Carolina Vend-A-Matic incorporated to do business in North Carolina.

None of these facts were known to us at the time of the *Deering Milliken* case. This is why they were not raised on appeal. They had been concealed from us.

Senator BAYH. The reason I raise this question is that there has been some question as to just what kind of judge we are looking for here. Are we looking for a labor judge, a management judge, or are we looking for one who can serve as an unbiased judge to weigh all issues and in this difficult area that we are talking about as far as you are concerned?

Mr. POLLOCK. Senator, we are certainly not looking for a prolabor judge, nor are we looking for an antilabor judge. We are seeking a judge that can be objective, impartial, and hand down the decisions that are in the best interest of the parties involved and in the best interests of the Nation.

Senator BAYH. Is it fair to ask you whether in the light of your experience you felt if you had a case that reached the Supreme Court that you would get this kind of a determination from the present nominee?

Mr. POLLOCK. Well, it hapens that in our industry, many of our labor cases reach the Supreme Court. The *J. P. Stevens* case, the *Darlington* case, and *West Point Pepperill* case all reached the Supreme Court.

Senator BAYH. West Port?

Mr. POLLOCK. West Point Pepperill.

The Supreme Court refused to take certiorari in the West Point Pepperill, but these three cases have reached the Supreme Court in

the last several years, so you can see our concern about who sits on the highest Court in this country.

Senator BAYH. Mr. Pollock, I do not want to pursue this at any great length. I would like to request some answers either at this time, or later, as to the relationship that the 46 firms that Carolina Vend-A-Matic is doing business with. I would like for you to go over this list and give us your judgment as to which ones are related with the textile industry, and further I would like to get your knowledge, if you have it, as to whether these plants are subsidiaries with some of those companies that have been involved in the litigation which has been and is in all probability likely to in the future reach the Supreme Court, if that is not too much to ask.

Mr. Chairman, I do not care whether that question is answered now or later, but I would like to have that in the record so that we will have some idea of the relationship of the business of Carolina Vend-A-Matic, and what impact sitting on a case involving the textile industry it might have.

I might also ask our witnesses if they would give us some sort of history relative to the textile firms involved. Are these native firms, are they family firms, are they firms that are originated from somewhere else that have come into that area for one reason or another, so we can have a complete record of just exactly what we are dealing with here.

Mr. POLLOCK. We have a copy of the list you made reference to but we just got it within the last several hours.

Senator BAYH. If you would rather, submit this tomorrow or the next day.

Mr. POLLOCK. Well, there are some statistics we would like to offer at this moment.

Senator BAYH. Fine. If I might be excused, Mr. Chairman.

Mr. POLLOCK. Out of 46 companies listed——

Senator BAYH. I apologize for leaving. I will read what you have to say tomorrow.

Mr. POLLOCK. All right.

Out of 46 companies listed here, over 30 are textile plants, many of them members of the chain companies that were mentioned in the testimony before this committee. We can give you an analysis of this list at some subsequent date, but I would like to say that out of the over 30 companies listed, there is not one that is organized and has a union.

The CHAIRMAN. You may proceed.

Mr. POLLOCK. Mr. Chairman, my name is William Pollock. I am general president of the Textile Workers Union of America. I am accompanied here by two of my associates, Miss Patricia Eames, general counsel of our organization, who was the lawyer at the time that the *Darlington* case developed, and is our lawyer now.

My other associate is vice president Paul Swaity, who is in charge of the subject matters which will be discussed at some length in my brief.

I am the general president of the Textile Workers Union of America, as I said. I have come before this committee to testify against confirmation of the appointment of Judge Clement Haynsworth to the U.S. Supreme Court.

I do so because we in the Textile Workers Union of America are convinced that a conspiracy exists among the giant corporations of the Southern textile industry.

Its aim is to deny more than a half million American textile workers their right to form and join unions as set forth in the National Labor Relations Act.

We further believe that Judge Haynsworth is imbued with the philosophy behind this conspiracy, and has been responsive to its objectives, first as a partner in a law firm that represented many of these textile corporations and later as a Federal judge.

The CHAIRMAN. Mr. Pollock, I have a copy of your prepared statement. Are you following that statement or is this an additional statement?

Mr. POLLOCK. I have a digest of the statement to make it shorter.

The CHAIRMAN. I see. That is all right.

Mr. POLLOCK. So that it would not take up too much of the time of the committee.

The CHAIRMAN. You may proceed.

Mr. POLLOCK. In that process he has demonstrated a deplorable lack of understanding of the legitimate aspirations of working men and women, and as other witnesses at this hearing are testifying, that shortcoming also extends to the aspirations of black people.

To understand the significance of what I am saying, let me explain the nature of this conspiracy and how it operaes. This is not a benign conspiracy. It is a very dirty business, wherein the textile corporations that are involved ruthlessly destroy the human beings who stand in their way.

A prime example is J. P. Stevens & Co., the world's second largest textile manufacturer. This company has been found to have unlawfully fired more than 100 workers, only for the reason that those workers believed in the promise of Federal law that they have a right to join a union.

A second case in point is the Deering, Milliken Corp., which closed down its Darlington, S.C., plant because its employees had exercised their lawful right to vote for a union.

In that process Deering, Millikin wiped out the jobs of more than 500 workers.

Let me say that both of these cases reached the Supreme Court.

Another recent example is West Point Pepperill, which moved before the Supreme Court but was denied certiorari in the case involving our union. In other words, it is not unusual for cases involving textile workers and the textile industries conspiracy to come before the Supreme Court. That is why we are so deeply concerned about who sits on the highest Court of the land.

To resume, we call this a conspiracy for a very simple reason. The pattern of opposition which textile workers, and I might add other Southern workers, repeatedly encounter is so consistent and so uniform in so many places that it cannot accurately be called anything other than that.

Once a worker moves to form a union, the same antiunion tactics are followed on a predictable schedule, no matter where the company is located.

Let me spell this out briefly:

Once union sentiment is detected in any given plant, the company calls in an attorney or a management consultant who conducts training courses for supervisors on all management levels. They are taught how to track down prounion employees, how to bribe others to serve as informers, how to exploit the fear of the workers, how to mobilize community pressure against the union, and how to circumvent the National Labor Relations Act. Then a reign of terror is launched in the plant. Workers are brainwashed at captive audience meetings. Threats are made to close the plants. Workers are spied upon and interrogated by supervisors. Workers who withstand these pressures are then blacklisted.

Loopholes in the law are exploited to delay a representation election while the campaign to wipe out union sentiment continues.

The power structure of the community is then mobilized against the workers. Debts of union members are called in by bankers. The local newspaper whips up antiunion sentiment. The attack reaches its peak on the eve of the representation election.

Even if the union wins in the face of such an onslaught, the employer is ready with the next step. He appeals the election to the National Labor Relations Board and then to the courts. The delays won by these moves give him additional time to browbeat union members.

When the appeals run out, the employer embarks on a new course. He refuses to bargain in good faith. He demands a contract which is booby trapped with conditions that would cancel out any possibility of genuine collective bargaining.

For example, he insists upon a no-strike clause, and couples this with a refusal to arbitrate. Without the right to strike or arbitrate, workers have no way to have their grievances settled.

Having rejected this kind of contract, the workers' only recourse is to strike for a fair agreement, and if a strike starts, the employer secures an antipicketing injunction. Strikebreakers are imported and escorted by police into the plant. Pressure from the community's power structure reaches a peak.

Workers are finally beaten into submission, and the union is destroyed.

This is how the conspiracy functions in town after town throughout the South. You can measure its effectiveness by the great extent to which southern workers remain unorganized. You can also measure the heavy price which working men and women, and all of the people of the South as well, are paying, because the benefits of collective bargaining are passing them by. That price is spelled out in low wages, substandard working conditions, and grossly inadequate fringe benefits.

In this year of 1969 the average straight-time earnings of southern textile workers lagged $33.20 a week behind the average earnings of all American manufacturer and production workers. The national average is $3.03 an hour. The textile average is $2.20 an hour, or 83 cents an hour lower.

Because of this conspiracy, a chain reaction has set in. It is reflected by inadequate health, education, and housing facilities, and this lack in turn maintains the visious circle of poverty in this region.

It need not be that way, because the textile industry is no longer backward or unprofitable. Since 1960 it has become a thoroughly modern, extremely efficient, and highly profitable industry. It can well afford to pay high wages and provide meaningful fringe benefits.

This committee does not have to take our word alone that such a conspiracy exists. Judge Boyd Leedom, who passed away a month ago, came to a similar conclusion. He was a former South Dakota Supreme Court justice, who served as Chairman of the National Labor Relations Board during the administration of President Eisenhower. Neither that administration nor Judge Leedom could ever be accused of prounion bias, but Judge Leedom was a fair and just man. He was a trial examiner who presided when the third *Unfair Labor Practice* case involving J. P. Stevens & Co. was tried, and as the NLRB and all reviewing courts found in each of the seven *Stevens'* cases which so far have been decided, Judge Leedom also found that J. P. Stevens had committed serious violations of the law. More important, for the purpose of this hearing, he found the existence of a conspiracy on the part of textile management to flout all concept of law and order, and to commit whatever violations of law and common honesty were required in order to deprive workers of their legal right to form unions.

Judge Leedom's opinion in that case made the following point:

> J. P. Stevens is not the only giant in the textile industry to do substantial business in the so-called South that seems to be rejecting a national labor policy. Whatever the reason, thousands of employees in wide geographic areas are being denied such economic benefits as may flow from the Labor-Management Relations Act.

Where does Judge Haynsworth fit into this sort of picture? We do not believe that Judge Haynsworth personally counsels J. P. Stevens, Deering Milliken, or any other practitioner of antiunionism on how to violate the law, but we do believe that he has been caught up in the snowball of this conspiracy. He has been foremost among the judges of the fourth circuit who have fought to limit the rights of workers which are guaranteed under the National Labor Relations Act.

We believe that his record in labor cases since he has been a member of that court demonstrates his identity with the general view of the conspiracy.

Since Mr. Thomas Harris, the associate general counsel of the AFL–CIO has detailed that record, I will not burden you with the particulars. I would like to underscore what Judge Haynsworth's record shows. That during his 12 years on the bench, he sat on seven labor cases that have been reviewed by the Supreme Court. In all seven cases, Judge Haynsworth took the antilabor position.

In all seven cases Judge Haynsworth was reversed by the Supreme Court. In six of those cases, the Haynsworth position was unanimously rejected by all participating Supreme Court Justices.

By contrast, his position was supported by only one Supreme Court Justice, and only in one case.

Similarly Judge Haynsworth sat on 13 labor cases in which there was a division of opinion among his fellow judges. Judge Haynsworth voted against labor in 10 of those cases.

We further believe that Judge Haynsworth's record in civil rights cases relates directly to the interests of the Southern conspiracy.

The textile industry in that region has historically discriminated against black people. Until the very recent past, one could accurately say that blacks have been excluded from all but the most menial jobs in the industry.

The 1960 census shows that nonwhite employment in the textile industry was 3.3 percent compared to all manufacturing figure of 7.6 percent.

It is true that nonwhite employment in the textile industry has increased substantially since that time. The reason for the increase, as industry spokesmen have admitted, is the pressing economic necessity caused by a shortage of available labor.

We know there were many reasons for industry's discrimination against black people, but we believe that since the Second World War, an important reason was the industry's desire to exclude a block of workers it had good cause to believe would be likely to try to form and join unions.

In short, we see the denial of civil rights as part of the general pattern of the Southern textile conspiracy.

We will not detail Judge Haynsworth's record on civil rights. That record is covered in the testimony of the Civil Rights Leadership Conference. We are persuaded, however, that the NAACP has done it fairly by declaring that Judge Haynsworth "was almost invariably in support of the standpat segregationist status quo position."

The Textile Workers Union of America believes that it is because of Judge Haynsworth's views in these matters that the Southern textile conspiracy would be delighted to see him advanced to the Supreme Court of the United States.

Finally, we believe that Judge Haynsworth operates within that conspiracy. When he went into the vending machine business, as one of the founders of the Carolina Vend-A-Matic Co. in 1950, his company recruited its general manager from the Deering, Milliken chain. Two other associates in that company came from the Daniels Construction Co., a nontextile participant in the conspiracy to violate the labor law.

The Haynsworth Vending Machine Co. did its primary business with the Southern textile industry. It made a great deal of money. Starting in 1950 with an authorized capital of only $20,000 it sold out 14 years later for $3,200,000.

Judge Haynsworth owned one seventh of Carolina Vend-A-Matic & Co. Thus in addition to whatever profits he previously received, he realized nearly half a million dollars when his company sold out.

The vending machine business was not Judge Haynsworth's only link with the textile conspiracy. From 1955 through 1957, he was a senior partner of the law firm of Haynsworth, Perry, Bryant, Marion & Johnson, which represented the J. P. Stevens, Deering, Milliken, United Merchants & Manufacturers, and many other textile companies participating in the Southern antiunion conspiracy.

Senator ERVIN. Mr. Pollock, I hate to interrupt you, but I think the evidence so far shows that the only one of the Deering, Milliken things that Judge Haynsworth's firm represented was Judson Mills, one mill out of 27.

Mr. POLLOCK. You say that it did not represent Deering Milliken?

Senator ERVIN. None except the Judson Mill.

Miss EAMES. Judson Mills is the one they represented, yes.

Senator ERVIN. Judson Mills was one of about 16 companies.

Mr. POLLOCK. Was one of the Deering Milliken companies.

Senator ERVIN. Yes, one of the Deering Milliken, that is right. The evidence is that after it was acquired by Deering Milliken, that they ceased to have any representation except on occasions as the local counsel.

Mr. POLLOCK. But Justice Haynsworth did represent the——

Senator ERVIN. Judson——

Mr. POLLOCK. Judson Mills.

Senator ERVIN. For a time, yes.

Mr. POLLOCK. To this day the firm which now has Judge Haynsworth's nephew as an associate continues to represent these and numerous other clients of this type. We believe it is characteristic of his identity with the conspiracy that he sees nothing improper in having been a one-seventh shareholder and an officer of a company doing business with the Deering Milliken Corp. at a time when he was participating in a decision that directly and vitally concerned that very same corporation.

I will not go into details of what we believe was the case of conflict of interest on Judge Haynsworth's part, even though our union was a party to that matter.

Miss Patricia Eames, the union's attorney both now and at the time that situation developed will cite chapter and verse when she testifies. But I want to make this point as I conclude. Judge Haynsworth so fully accepts the value of this conspiracy that he does not even perceive a conflict of interest when he sits as a judge in a case involving a company which has been his client, and from whose business his company is profiting.

We believe that Judge Haynsworth is a product of this conspiracy, and from the sidelines a part of it. We further believe he acted on its behalf both before and after becoming a Federal judge.

Consequently we consider him to be to closely identified with a partisan interest which is hostile to the welfare of working people to be confirmed as a justice of the U.S. Supreme Court.

That concludes my statement.

(Mr. Pollock's prepared statement follows:)

TESTIMONY OF WILLIAM POLLOCK

My name is William Pollock. I am the General President of the Textile Workers Union of America. I am against the confirmation of the appointment of Judge Clement Haynsworth to the United States Supreme Court, because we believe that Judge Haynsworth has become imbued with the interests of a conspiracy which we believe exists among the textile employers in the southeast portion of this country. We believe that this conspiracy has acted to violate the law of the land to whatever extent necessary to defeat workers' rights to form and join unions; that this conspiracy cheerfully violates the National Labor Relations Act; and that it has until recently equally cheerfully violated Title VII of the Civil Rights Act by excluding black workers from the textile industry.

We believe that workers' rights to form and join unions, codified by the Congress in the National Labor Relations Act, have been protected by the United States Supreme Court. We believe that many of the lower federal courts—and particularly the United States Court of Appeals for the Fourth Circuit—have not protected these rights, and thus have often been reversed by the Supreme Court.

We believe that Judge Clement Haynsworth has been foremost among the judges of the Fourth Circuit who have sought to limit workers' rights guaranteed by the National Labor Relations Act.

We believe that it is because of that leadership on Judge Haynsworth's part that the southern textile conspiracy, out of which Haynsworth has come, and to which he is still responsive, has sought his advancement to the United States Supreme Court.

We believe that it is symptomatic of his identity with the conspiracy that he sees no impropriety or conflict of interest in his having been a one-seventh shareholder of, and officer of, a corporation doing business with, and seeking business from, one of the giant textile employers, at a time when he was participating in a decision directly and vitally concerning that very employer. Textile Workers Union of America was involved in that conflict-of-interest question, and separate testimony regarding that matter will be given, citing chapter and verse, by Patricia Eames, attorney for TWUA both now and at the time the problem arose.

Rather than deal with the details of that somewhat technical, but illustrative, incident, I would like to address myself to the larger question of Judge Haynsworth's relationship to the conspiracy to which I have alluded.

Judge Boyd Leedom, whose death last month we greatly regret, was a former South Dakota Supreme Court Justice, appointed as Chairman of the National Labor Relations Board during the administration of President Eisenhower. Neither that Administration nor Judge Leedom can be accused of having had any pro-union bias, but Judge Leedom was a fair man and a man of rectitude. He was the Trial Examiner who presided at the trial of the third J. P. Stevens unfair labor practice case. He found, as the Board and all reviewing courts have found in each of the seven J. P. Stevens cases which have so far been decided, that Stevens had committed serious violations of the law.

More important, for purposes of this hearing, he found the existence of a conspiracy on the part of textile management to flout all concepts of law and order, to commit whatever violations of law and of common honesty were required in order to deprive employees of their legal rights to form unions.

Judge Leedom's Opinion stated in part:

"It is well known to all persons having more than a casual interest in labor-management relations within the country, that [management in the South] reject[s] in greater or lesser degree, and in ways less subtle than in some other parts of the nation, the concept of collective bargaining. . . . In conformity with such common knowledge, I have the inescapable but independently reached, conviction . . . from having heard innumerable witnesses at the trial, and having carefully digested and reviewed their testimony from the typewritten transcript, that many of the witnesses called by Respondent testified as they did pursuant to a policy, made at a higher level of management than theirs, to defeat this Union's organizational effort at the cost, if necessary, of committing unfair labor practices and then denying the unlawful acts in the process."

* * * * * * *

"Respondent is not the only giant in the textile industry, doing substantial business in the so called "South," that seems to be rejecting the national labor policy. It is not generally known whether this position is due to a coincidence, to a common understanding, or to a fear on the part of each that if it should break the barrier into enlightened employee policy, it would jeopardize its competitive position. Whatever the reason, thousands of employees and wide geographic areas are being denied such economic benefits as may flow from the LMRA."

In the course of recent years we have seen unfair labor practice case after unfair labor practice case demonstrate that this conspiracy includes not only J. P. Stevens but also Deering Milliken, United Merchants & Manufacturers and every other southern textile operation where workers have tried to organize. In every one the employers have engaged in conduct which the NLRB and the courts have found to violate the National Labor Relations Act. I am informed that these tactics are practiced, though far less monolithically, in other industries in the South. This is the conspiracy. I know for a fact that textile companies which *do* operate within the metes and bounds of law in *other* geographic areas behave quite differently, acquiescing to the demands of the conspiracy in their operations in this area.

Judge Haynsworth operates within the conspiracy. When he went into the vending machine business, founding Carolina Vend-A-Matic Co. in 1950, he took

his general manager out of the Deering Milliken textile chain. Two other associates of Haynsworth's in Carolina Vend-A-Matic came from Daniels Construction Company, a non-textile participant in the conspiracy to violate the labor law. The Haynsworth vending machine company did its primary business with and made its money from the southern textile industry. Carolina Vend-A-Matic made a great deal of money from the textile industry. Starting in 1950 with an authorized capital of $20,000, it sold out fourteen years later for $3.2 million dollars. Haynsworth owned one-seventh of Carolina Vend-A-Matic, and thus received about a half-million dollars at the closeout of the company, in addition to whatever profits he had previously received.

The vending machine business is not the only link of Judge Haynsworth's with the textile conspiracy, however. Before 1957 when he joined the Fourth Circuit, when he was the senior partner in the law firm of Haynsworth, Perry, Bryant, Marion & Johnston, his firm represented J. P. Stevens, United Merchants & Manufacturers and many, many other textile companies participating in the southern conspiracy, as well as Daniels Construction Company, a non-textile participant. To this day, the firm, to which Judge Haynsworth continues to have family connections, continues to represent Stevens, Daniels and numerous other participants in the conspiracy.

More appallingly, the firm, when Judge Haynsworth was a member, and to this very day, represented and represents Judson Mills, a segment of the Deering Milliken empire. Thus when Judge Haynsworth participated in the Fourth Circuit's decisions in the Deering Milliken cases, he was sitting in judgment of a firm which had for many years been his client, and which was at that very time a client of his former firm.

We believe that Judge Haynsworth's record in labor cases since he has been a judge of the Fourth Circuit demonstrates his identity with the world view of the conspiracy. I will not detail that record, as I understand that it is being detailed in the testimony of Thomas Harris, the Associate General Counsel of the AFL–CIO. In summary, however, Mr. Harris demonstrates that during Judge Haynsworth's twelve years on the bench, he has sat on seven labor cases that have been reviewed by the Supreme Court. In all seven of those cases Judge Haynsworth took the anti-labor position. In all seven of those cases Judge Haynsworth was reversed by the Supreme Court. In six of the cases the Haynsworth position was unanimously rejected by all participating Supreme Court Justices. Judge Haynsworth's position was supported by only one Supreme Court Justice in only one case. Similiarly, Judge Haynsworth has sat on thirteen labor cases in which there was a division of opinion among his fellow judges. Out of those thirteen cases Judge Haynsworth voted against labor in ten.

Moreover, we believe that Judge Haynsworth's record in the civil rights cases, in the decision of which he has participated, relates directly to the interests of the southern conspiracy.

The textile industry in the South has historically discriminated against Black people. Until the very recent past one could accurately say that Blacks have been excluded from all but the most menial jobs in the industry. The 1960 census showed that non-White employment in the textile industry was 3.3% while the all-manufacturing percentage was 7.6%. It is true that Black employment in the textile industry has increased substantially since that time. The reason for the increase, as is admitted by industry spokesmen, is the pressing economic necessity of a shortage of available labor. We know that there were many causes of the industry's discrimination against Black people, but we believe that in the period since the Second World War an important cause among the others has been the industry's desire to exclude a bloc of workers who it had good reason to believe would be most likely to seek to form and join unions.

In short, we see the denial of civil rights in textile employment as a part of the pattern of the southern textile conspiracy.

I will not detail Judge Haynsworth's judicial record on civil rights cases. I understand that that record is being covered in the testimony of persons more knowledgeable than I regarding civil rights. I am persnaded, however, that it is fair to summarize the record in the way the NAACP summarized it: that Judge Haynsworth "was almost invariably in support of the stand-pat, segregationist, status quo position."

Again we see Judge Haynsworth's position as identical with the position of the conspiracy.

This is not a benign conspiracy. It is not even a morally neutral conspiracy. It is a very dirty business. It wantonly destroys the human beings who stand in its

way. J. P. Stevens has been judicially found to have fired more than 100 workers only for the reason that those workers believed in the promise of federal law that they had a right to join unions. When Deering Milliken closed down its Darlington plant because those workers had exercised what they believed to be their right to form a union, it unlawfully wiped out the jobs of over 500 human beings, without regard for the fact that there were workers in that plant, over 60 years of age, who had gone to work in the mill at age seven. Let me describe briefly how the conspiracy operates.

First the company calls in an attorney or management consultant specializing in such services.

The specialists conduct training courses for supervisors on all management levels. They are taught:

How to track down pro-union employees.

How to bribe others to serve as informers.

How to exploit the fears of workers.

How to mobilize community pressure against the union.

How to circumvent the National Labor Relations Act.

A reign of terror is then inaugurated in the plant:

Workers are brainwashed at captive-audience meetings.

Threats are made to close the plant.

Workers are spied upon and interrogated by supervisors.

Withdrawals from the union are forced and duly publicized.

Workers who withstand these pressures are fired and then blacklisted.

Loopholes in the law are exploited to delay a representation election while the campaign to exterminate union sentiment continues.

The power structure of the community is mobilized against the union:

Anti-union "citizens committees" are formed, enlisting merchants, clergy, professional men.

Debts of active union members are called in by bankers.

Local newspaper whips up anti-union feeling.

Workers are denied a place to hold union meetings.

Union organizers are denied lodging in nearby hotels and motels.

The attack reaches its peak on the eve of the representation election.

Too often, by this time, the organizing campaign is crushed. But even if the union wins, the employer is ready with the next step.

The election is appealed to the National Labor Relations Board, and then to the courts. The delays won by these moves give the employer additional time to terrorize union supporters.

When the appeal route runs out, the employer embarks on a new course. He refuses to bargain in good faith. He demands a contract which is booby-trapped with conditions that would cancel out any improvements he might offer.

For example, he insists upon a no-strike clause and couples this with a refusal to arbitrate. Without the right to strike or arbitrate, workers have no way to have their grievances settled. If they accept, such a contract would not be worth the paper it is written on. Their only means of protest would be a wildcat strike, and this would leave their union wide open for heavy damages and bankruptcy.

Having rejected this kind of a contract, the workers' only recourse is to strike for a fair agreement. This is a situation which the employer deliberately provokes because the conspiracy arms him with the weapons he needs to counterattack. Once a strike starts:

The employer secures an anti-picketing injunction as a matter of course.

Strikebreakers are imported and escorted into the plant by police.

Pressure from the community's power structure reaches its peak.

Workers are browbeaten into submission and the union is destroyed.

The effect of the conspiracy's operation is that the South as a region pays a high price. That price is spelled out in low wages and substandard working conditions. It is underlined by incredibly few fringe benefits. And the chain reaction which these conditions produce is evident from the findings of the Bureau of Labor Statistics and the United States Census.

The textile industry no longer is backward or unprofitable. Since 1960 it has become a thoroughly modern, extremely efficient and highly profitable industry. Last year the top officers of 56 major textile corporations received average salaries of $102,000 each. And this figure did not include other forms of compensation such as deferred profit-sharing payments, stock options, dividends or expense allowances.

Yet this industry, which grew fat while pocketing the benefits of special treatment at the hands of the Government, keeps pushing its workers around, sharing very little of its prosperity with them.

In this year of 1969 the average straight-time earnings of textile workers lag $33 a week behind the average earnings of all American manufacturing production workers. The textile hourly average is $2.20. The national manufacturing average is $3.03, exactly 83¢ an hour higher.

Those fringe benefits which have established the framework for the economic security of workers in organized industries either do not exist in the typical unorganized textile mill or, if they do, they are provided in so small a degree that they afford little protection against the hazards of illness, old age or unemployment.

In a period when other industries provide nine to twelve paid holidays a year, the vast majority of unorganized textile mills provides not more than three. Health insurance is woefully inadequate. Even so, the worker is called upon to pay part of the premium.

Severance pay is unknown. Pension programs, in the handful of plants where they exist, are only token in nature. By contrast, the organized auto or steel worker can retire on a monthly pension that is greater than the wages which the unorganized textile worker receives on his job.

Because the textile industry is the principal employer of factory help in states like North Carolina, these low standards have a depressing effect on the general level of wages. They establish the prevailing level and new plants rarely depart from that level. The result is that much of the industrial expansion in the Southeast in recent years has served to perpetuate the poverty of the region rather than raise the living standards of the people.

A recent study by the North Carolina Fund, an agency concerned with the development of that state, surveying the results of North Carolina's intensive industrialization campaign, declared: "We have seen North Carolina shift from a poor agricultural state to a poor industrial state. . . . We have experienced industrialization without development."

The textile industry provides nearly 250,000—or about 42%—of North Carolina's 587,000 factory jobs. As the major industrial employer, it must shoulder the major blame for this deplorable situation.

What is true of North Carolina is true of other southeastern states. All are paying the heavy price exacted from the public by the textile industry's anti-union conspiracy. Despite its vast industrial expansion, the entire region remains at the bottom of the national economic ladder—because a highly essential ingredient is missing.

Because of lack of unionism a chain reaction has set in and it is reflected by inadequate health, education and housing. And this lack, in turn, maintains the vicious cycle of poverty.

The last National Census showed that infant mortality in the Southeast averages 20% higher than the national rate. In the two leading textile states, North Carolina and South Carolina, it is 22% and 25% higher, respectively.

The number of physicians available to care for people is much lower than in the rest of the country. North Carolina is 29% below the national average, while South Carolina is 45% below it.

Illiteracy is 75% higher in the Southeast, standing at 14% compared to 8.4% nationally.

The proportion of dilapidated housing is 36.4% in the Southeast, or 40% greater than the national average of 26%.

Because these low-wage states are unable to finance adequately the programs which are needed to raise health, education and housing standards, the federal government is compelled to contribute a higher share of such costs than it does to other states. In the Southeast, federal assistance accounted for 76% of public assistance payments. In the rest of the country, the federal share was only 50%.

To the rest of the country, the Southeast is a heavy anchor holding back the nation's full economic growth. It also holds out the threat that other regions may be dragged down to the same level.

We believe Judge Haynsworth is a product of this conspiracy and, at the sidelines, a part of it. We believe that he has acted on its behalf both before and after becoming a federal judge. We believe that he so fully accepts its values that he does not even perceive a conflict of interest when he sits as a judge in a case concerning a company which has been his client and whose business his corporation is profiting from.

We therefore believe that he is too identified with a partisan interest, hostile to the interests of working people, to be confirmed as a Justice of the United States Supreme Court.

Senator ERVIN. Mr. Pollock, you have mentioned the seven cases cited by Mr. Tom Harris to show union bias in decisions, and like Mr. Tom Harris, you omit the 37 cases that Judge Haynsworth's court at the same time decided in favor of the unions. Now four of these seven cases involved only one point of law, and that was the point under what circumstances can you use authorization cards instead of a secret election to determine whether a union represents the majority of the employees in a bargaining unit.

Now one of those cases was not even appealed to the Supreme Court. That is the *Logan* case. And in the *Logan* case, which was the only one of them that Judge Haynsworth wrote the opinion, Judge Haynsworth held that they would not even force the decision of the National Labor Relations Board because upon the court's interpretation of the record, there was no evidence to show two things. First, that the union actually represented a majority of the employees of the particular company, and second, that there was no evidence of any unfair labor practices which would render it impossible to hold a fair election.

None appealed from that decision, and that has never been overruled by the Supreme Court. I will admit there was some reference to that case in the *Gissel* case, and there was a reference to that case in the *Gissel* case by Justice Harlan. He pointed out that Judge Haynsworth in the opinion in the *Logan* case said that where there were such unfair labor practices as to disclose that you could not have a fair election, then the National Labor Relations Board could order them to negotiate or accept as a bargaining agent on the basis of cards.

Chief Justice Warren, in discussing that point, which as I will say in a minute was mere dicta, said there was no large disagreement between the view expressed in the *Logan* case and the dicta that he was expressing. He said that instead of having to show quite a strong thing, that where there was evidence showing that it was likely that unfair labor practices had rendered it impossible to get a fair election, they could use cards.

Now, all of that was dicta. In those three cases that went up from the Fourth Circuit Court of Appeals, they were combined with a case from another circuit. The old rules of the Board had said that in determining whether the employer should be required to bargain on the basis of cards rather than a secret election, the question involved was whether or not he had the honest and reasonable belief that the union did not represent the majority of the employees.

The brief that was filed on behalf of the National Labor Relations Board in that case in the Supreme Court was under the old law, but when the counsel for the National Labor Relations Board arose to argue that case, he proclaimed to the world for the first time that the National Labor Relations Board had offered a new rule on this question, that they would no longer consider the objective beliefs of the employer.

Chief Justice Warren said in that case that since the cases had been tried by the National Labor Relations Board, and by the circuit court under the old rules of the National Labor Relations Board, the Su-

preme Court would have to remand the case to the National Labor Relations Board in order for them to make findings based on the new rules which had been proclaimed on the oral argument of counsel for the National Labor Relations Board.

So four cases that hinge on that point are cited to prove union bias against Judge Haynsworth, and I submit that they prove nothing of the kind except that he was not a good enough prophet to be able to foretell at the time he sat on these four cases that at some time in the future the National Labor Relations Board would change the rules under which it was acting. So he was a pretty good lawyer but an awfully poor prophet.

Now, another one of these cases was the case that the circuit court had decided in an appeal to the Supreme Court. The Supreme Court had never ruled on the point of law involved in that case until 6 days before the case came up in the Supreme Court, just 6 days. They reversed this decision of the circuit court on the basis of the decision that was handed down long after it was tried before the circuit court. The case was handed down 6 days before the Supreme Court reversed the fourth circuit.

Now, another one of these cases—that disposes of five of them—was one where Judge Haynsworth upheld the ruling of the National Labor Relations Board, on the question of organizational picketing, recognition picketing.

It went to the Supreme Court. After the circuit court of appeals had passed on that case, and before it was heard in the Supreme Court of the United States, Congress passed an amendment to the law in 1959, and it was argued in the Supreme Court on the basis of that new law. There were three judges who dissented from the conclusion.

They said instead of the court deciding the case on its merits, they ought to send it back for findings by the National Labor Relations Board on the basis of that new law, so that is six of the seven cases.

The other case was where seven nonunion men were working in a plant, and the plant was very cold. In the room they were confined to the furnace had gone out. They went home because of the coldness, and in doing so, they violated the rule of the company which said that before an employee left his work, he should tell his foreman he was going. And so they were fired.

They brought a proceeding before the National Labor Relations Board, and it ordered them reinstated. The circuit court held that they were not for reinstatement because they should have given the employer an opportunity to remedy this cold before they left. And so they refused to enforce it.

It came to the Supreme Court of the United States, and in the opinion written by Judge Black the ruling of the circuit court was reversed. They held that these seven nonunion men were acting together in concert for the protection of their mutual interests, and therefore that they were entitled to reinstatement.

Now, I submit that a ruling of Judge Haynsworth involving seven nonunion men does not show any bias against union men or unions, and yet that is the seven cases.

We have paraded before this committee by Mr. Harris to prove union bias, 10 cases on the part of Judge Haynsworth, and he totally ignored the 37 cases which were decided to the contrary.

That is my view, and I have read all of these cases prior to analyzing them. In my view they show no sustaining points.

I just have one other question to ask you. You spoke of Judge Leedom, who at one time was associate or chief justice of the North Dakota court; wasn't he?

Miss EAMES. He was.

Senator ERVIN. And he resigned to accept an appointment as a member of the National Labor Relations Board; did he not?

Miss EAMES. That is correct.

Senator ERVIN. That is right?

Miss EAMES. Yes.

Senator ERVIN. And the first two times there was any vote taken on the *Darlington* case by the National Labor Relations Board, Judge Leedom voted with Judge Rogers that Darlington had not committed, was not under any obligation under the National Labor Relations Act to reemploy or reimburse the discharged employees?

Miss EAMES. That is correct; with the minority.

Senator ERVIN. I think he was a very good man, too.

Mr. POLLOCK. This is not the question. We still stand on the statement that Judge Leedom made in the *Stevens* case, that there is a conspiracy in the South among large textile corporations.

Senator ERVIN. I have no further questions of Mr. Pollock. I do not care to elaborate on the matter. I am addressing this to Miss Eames.

You advised Judge Sobeloff that the union, that the Textile Workers Union of which you are the counsel had received an anonymous telephone call that Judge Haynsworth had voted against the union in the *Deering Milliken* case as the first vice president of Carolina Vend-A-Matic Co., and there has been some kind of contract made between him and Deering Milliken about machines in the plant.

You wrote Judge Sobeloff and I think quite properly and called the message given by the anonymous phone call to his attention and you said:

> Whether or not a criminal violation has occurred we certainly believe that if the Deering Milliken contract was thrown to the Carolina Vend-A-Matic, Judge Haynsworth should be disqualified from participating in the decision in this case, and that the resulting two to two decision should lead to the sustaining of the National Labor Relations Board decision below.

That letter was written on December 7, and I say I thoroughly approve of your writing the letter to the chief judge on this basis.

Now, then, there were some letters passed back and forth, and you were informed that Vend-A-Matic did have machines in three, I believe it was three, of the Deering Milliken mills; were you not?

Miss EAMES. Three or five depending on how you count it.

Senator ERVIN. Yes. Well, they had three places of business in one building, and they had some there, and then they had them in two other plants, but they had none of any kind in the Darlington plant so far as you know; did they?

Miss EAMES. Darlington had been closed down for a long time at that time. I do not know whether they had previously had them in the Darlington plant.

Senator ERVIN. Regardless of whether you knew about other facts, you did know at that time that Judge Haynsworth was the vice president or had been vice president of Vend-A-Matic; did you not?

Miss EAMES. Yes, sir.

Senator ERVIN. So you knew if there was any interest or any impropriety in his sitting arising out of the fact that he had an interest in Vend-A-Matic, and out of the further fact that Vend-A-Matic was dealing with three or five mills in the Deering Milliken chain. In other words, you knew that he had an interest in the company; did you not?

Miss EAMES. I do not think that is a fair characterization of what we knew.

Senator ERVIN. Well, you had said that regardless of whether there was any crime proved, that he should have disqualified himself on account of his relations to Vend-A-Matic?

Miss EAMES. What I had said in my letter was that if the contracts had been thrown to Vend-A-Matic as had been alleged to us, then he should be disqualified.

Senator ERVIN. Yes, but in the course of the investigation, as a result of your letter, you as counsel for the Textile Workers of America found out that he actually was vice president of Vend-A-Matic. You were given notice of that; were you not?

Miss EAMES. We were given notice that he had been, yes.

Senator ERVIN. Then you wrote a letter to Judge Sobeloff. In fact, you got a copy of a letter from Judge Sobeloff, telling about these Vend-A-Matic machines in these mills, on February 18, 1964, did you not?

Miss EAMES. Sir?

Senator ERVIN. You got a letter from Judge Sobeloff who had conducted an investigation pursuant to this information given him by your letter of December 17th, if I am correct on the date, and Judge Sobeloff had an investigation made, did he not?

Miss EAMES. That is correct.

Senator ERVIN. And he wrote you a letter on February 18, 1964, which consisted of 5 pages, which is in the record, in which he informed you that Vend-A-Matic had reported that it had vending machines in 3 identified plants relating to Deering Milliken?

Miss EAMES. Senator Ervin, you referred to the fact that this letter was in the record.

Senator ERVIN. Yes.

Miss EAMES. In fact, I have not as yet had an opportunity to introduce it in the record, and indeed have not as yet had an opportunity to testify, and I wonder if perhaps I might testify before being questioned about my testimony?

Senator ERVIN. Wait just a minute. It is in the record because it was put in the record the first day of the hearing.

Miss EAMES. I was not aware of that.

Senator ERVIN. So you had notice that he was vice president of this company or had been vice president of this company, and that these machines were in these 3 or 5 Deering Milliken mills. Notwithstanding those facts, you wrote Judge Sobeloff saying, "With the basic fact established, having read and reread Mr. Updike's letter to you of January 17, I believe that the facts therein set forth established that Deering Milliken did not throw its contracts to Carolina Vend-A-Matic as alleged to our union on November 20. With that basic fact established it becomes clear that my collateral concerns as expressed to you in the last paragraph of the second page of my letter to you of December 17 become inappropriate."

You wrote that, did you not?

Miss EAMES. Yes, sir; I did.

Senator ERVIN. Now, at the time you wrote that letter, you closed it with some references that Mr. Updike thought you ought not to have called it to the attention of Judge Sobeloff—and I certainly disagree with Mr. Updike on that—you closed with a paragraph saying, "My letter to you has caused trouble. I am genuinely sorry for that, since we now know that the allegation made to our union was inaccurate we know that that trouble is unnecessary. Thus I am more regretful of the trouble caused. Sincerely, Patricia Eames, assistant counsel."

Now that was before the appeal was heard in the Supreme Court in that case?

Miss EAMES. That was reviewed by the Supreme Court; yes.

Senator ERVIN. And that was a time that you could have made a motion in the cause to set aside the decision, and ask for a new hearing on the ground that Judge Haynsworth had an interest which should have disqualified him; did you not? Was that not true?

Miss EAMES. Judge Haynsworth had concealed from us most of the facts relating to his interest in Carolina Vend-A-Matic. The only fact that was before us was that at some time he had been an officer. The fact that he owned a seventh, that has been concealed from us, the fact that he had been Deering Milliken's lawyer was concealed from us, and the fact that Darlington's present lawyers were his lawyers in North Carolina was concealed from us.

Senator ERVIN. But the fact that he had been vice president of Vend-A-Matic was not concealed from you but was known to you?

Miss EAMES. Yes, but because he hold us. He tried to conceal it. He never told us that but we found it out only by our own efforts.

Mr. POLLOCK. Mr. Chairman, I would respectfully request that the Chair give the witness an opportunity to testify before she is interrogated.

Senator ERVIN. I thought she had testified. I am sorry.

Mr. POLLOCK. I think she could answer a lot of these questions.

Senator ERVIN. I will ask her this. You did not go into court, although you knew he had been vice president of the company, and that the company had machines in the Deering Milliken plant? You did not go before the circuit court and ask them to set aside their three to two decision on the ground that he had an interest which disqualified him? That is a simple question. I think you can answer yes or no.

Miss EAMES. You have not asked me a question.

Senator ERVIN. Oh, yes. There is a question mark after that. There should be.

Miss EAMES. You made a statement. You did not ask me a question.

Senator ERVIN. I will put it as a question.

Just remember I am trying the best I can to put a question mark after this.

Despite the fact that you knew that Judge Haynsworth had been vice president of the Carolina Vend-A-Matic, and notwithstanding the fact that you knew that there were vending machines of Carolina Vend-A-Matic in three or five plants of Deering Milliken, you did not go into the circuit court, yes, into the circuit court and ask them to set aside the judgment refusing to enforce the decision of the National

Labor Relations Board on the ground that Judge Haynsworth had an interest which should have disqualified himself?

Miss EAMES. You are right and I would not again today if those were the only facts that I knew. That was my judgment as to the best way to protect my clients' interests on the basis of what had not been concealed from us.

Senator ERVIN. And then the Supreme Court honored the request of your clients for certiorari, and the case was presented to the Supreme Court, and you did not raise the question of any disqualifying interest being possessed by Judge Haynsworth at the time he sat in the circuit court on the ground that he had been vice president of this company, and that the company had vending machines in the Deering Milliken Mills?

Miss EAMES. At the time it was argued in the Supreme Court he was still concealing from us most of the facts about his interest in the case.

Senator ERVIN. You did know this much, and normally do you not think that you would infer that he was a stockholder after learning he was a vice president and you could have pursued that quite a little further and found out how much stock he owned?

Miss EAMES. No, sir. I would normally assume that if a judge had an interest in a company he would tell us; and that if he did not tell us he did not hold stock in it.

Senator ERVIN. Well, I would normally assume that if a lawyer for a client found out that a judge had any kind of an interest in a case and objected to it on that ground that the lawyer would pursue the inquiry and raise it in court. Is there anything else you want to testify? I have finished my questioning.

Miss EAMES. Yes: I would like to give testimony.

Senator HART. Mr. Chairman, I think it would be helpful if Miss Eames did read her statement, but having listened to the exchange, I am struck by the fact that at the very outset in your letter of December 17 you seemed to hint, and I think properly, your principal concern which you sought to have identified was whether or not there had been a criminal violation maybe in the throwing of contracts to this judge.

This seems to be basically your letter to Judge Sobeloff of December 17.

Miss EAMES. That is the only matter that I was raising in the letter to Judge Sobeloff, yes, Senator.

Senator HART. And you state there that he was an officer in the company—

> Only one fact which is now unknown whether or not the Deering Milliken contract was thrown to Carolina Vend-A-Matic needs to be known in order to conclude that Haynsworth should have disqualified himself from participating in this decision.

You indicate very clearly at the very outset that you felt this was the fact which was most critical in your judgment as to whether there should be a disqualification?

Miss EAMES. That was the only issue that we knew about at this time; yes, sir.

Senator HART. Mr. Chairman, if she can proceed we will have her statement in full.

Miss EAMES. My name is Patricia Eames. I am general counsel of the Textile Workers Union of America, AFL–CIO (TWUA). From

1958 through June of 1964, the period as to which I am about to testify, I was assistant general counsel of TWUA. In that capacity, I had occasion to correspond with the then chief judge of the U.S. Court of Appeals for the Fourth Circuit regarding Judge Clement Haynsworth. That correspondence came about as follows:

In 1956 Darlington Manufacturing Co. owned and operated a textile mill in Darlington, S.C. It was one of 27 mills controlled by Deering Milliken & Co. (see *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S.C. 263, 265.) Textile Workers Union of America won an NLRB election at the Darlington plant, and Deering Milliken closed the plant as a consequence. Lengthy and involved NLRB and court proceedings ensued.

A preliminary phase of the matter was before the Court of Appeals on June 13, 1963, and was decided on November 15, 1963. (See *Darlington Manufacturing Company* v. *NLRB*, 325 F. 2d 682.) It was originally set to be heard by a panel of three judges, not including Judge Haynsworth. Deering Milliken requested that the case be heard by the full five-judge court, including Judge Haynsworth. The Court of Appeals held, 3 to 2 with Judge Haynsworth the determinative vote—that "a company has the absolute right to close out a part or all of its business regardless of antiunion motives." This language is the Supreme Court's summary of the holding of the Court of Appeals. See 380 U.S. 263, 268. Judge Haynsworth joined in the majority opinion, which was written by Judge Bryan.

Subsequent developments appear from correspondence which is submitted to the committee herewith as appendices 1 through 10 of the written statement which I submitted. If they have not as yet been received as part of the record, I would like now to move that they be received.

Senator ERVIN. Yes. I am satisfied that they were received the first day, but if not, we will check on that, and if it is not included in the record, the exhibit attached to Miss Eames will be put in the record.

(The material referred to appears in the record of the first day of the hearings.)

Miss EAMES. Thank you, sir.

This correspondence speaks for itself. I would like, however, to point out the following facts in connection with it:

The charge against Judge Haynsworth, made in an anonymous telephone call to the union, in which I took the call for the union, was as follows: that charge was essentially that contracts had been thrown to Carolina Vend-A-Matic as a result of the decision. I wrote Judge Sobeloff to report this charge, and that is appendix 1 to the written testimony that I submitted, letter from Patricia Eames to Judge Sobeloff dated December 17, 1963.

Counsel for Deering Milliken interpreted this language as charging the company "with bribing, or attempting to bribe, a member of the Federal Judiciary." (App. 6, letter of January 17, 1964, from Stuart N. Updike to Judge Sobeloff.)

This accusation was not substantiated, and apparently was disproven, by the facts reported by Judge Sobeloff by counsel for the companies and by Judge Haynsworth. Nevertheless, the companies and Judge Haynsworth did disclose the following:

Judge Haynsworth was first vice president of Carolina Vend-A-Matic Co. when the first *Darlington* case was argued and decided; and was still first vice president at least when the second *Darlington* case was argued, though he resigned before the second decision was handed down. Carolina Vend-A-Matic had vending installations in Deering Milliken plants from 1958 on, which had average weekly gross sales of $974. In August 1963, some 2 months after the second *Darlington* argument, Carolina Vend-A-Matic secured the vending business in another Deering Milliken plant, assertedly on the basis of competitive bidding. This vending installation produced an average weekly gross of $1,000. During the same period, the summer of 1963, Carolina Vend-A-Matic bid unsuccessfully on two other Deering Milliken plants. The letter to Judge Sobeloff from counsel for Deering Milliken stated:

> We are, of course, in no position to deal with the allegations concerning Judge Haynsworth's ownership in Carolina Vend-A-Matic * * *. (Letter of January 17, 1964, from Stuart N. Updike to Judge Sobeloff.)

Judge Sobeloff's final letter to the union (app. 10, Feb. 18, 1964) does not reveal whether or not Judge Haynsworth had made any statement to his colleagues regarding ownership or in any salary from Carolina Vend-A-Matic.

The union at that time had no knowledge regarding Judge Haynsworth's ownership. It also had no knowledge of the fact that Judge Haynsworth's law firm, both while he had been a partner and thereafter, was and still is counsel for Judson Mills, a division of Deering Milliken, so that Judge Haynsworth was sitting on a case involving a former client.

Finally, we had no knowledge then that some facts at least were misrepresented to Judge Sobeloff by lawyers for the employer. In appendix 5 of my testimony, the lawyer for Darlington stated that he had no knowledge of any Carolina Vend-A-Matic matters, but in fact it is only 7 months previously that three of his partners had incorporated and become the directors of the Vending Company of North Carolina which Standard and Poor's shows is a subsidiary of Carolina Vend-A-Matic.

Thus Judge Haynsworth, unknown to the union, was sitting on a case involving a former client, and a case in which attorneys for one side were incorporators of the subsidiaries of his company.

The union promptly wrote Judge Sobeloff acknowledging that the facts set forth in the letter from counsel for Deering Milliken "established that Deering Milliken did not throw its vending machine contracts to Carolina Vend-A-Matic as was alleged to our union on November 20." In effect, the union apologized. (App. 9, letter of February 6, 1964, from Patricia Eames to Judge Sobeloff.)

The facts revealed by company counsel and by Judge Haynsworth, and a fact never revealed by either that Deering Milliken had been a client of Judge Haynsworth's and was still a client of his firm, did and do, however, raise the question of whether Judge Haynsworth should have disqualified himself in the *Darlington* case. The U.S. Code, title 28, provides:

> Section 455. Interest of justice or judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

The union did not pursue the question whether Judge Haynsworth should have disqualified himself. In dropping this matter it was influenced by the following considerations:

Most of the facts have been concealed from the union. The union did not have all the facts. We did not then know that Judge Haynsworth had a large ownership interest in Carolina Vend-A-Matic. We did not then know that Judge Haynsworth's law firm had been while he was in the firm and still was counsel to Deering Milliken. We did not then know that the law firm representing Darlington had been the incorporators of the North Carolina sub of Carolina Vend-A-Matic.

We knew only that the general manager of Carolina Vend-A-Matic had been eager to tell anyone who inquired that Judge Haynsworth was the first vice president of Carolina Vend-A-Matic. Mr. Dennis had been eager to use Judge Haynsworth's name.

The second consideration leading to drop the matter was that the union had related to the court a much more serious point which had been proven false. It was evident that the judges were not pleased with the union and the union would inevitably be a litigant before those judges for years to come.

The United States Code leaves it to the judge to determine whether "in his opinion" it is "improper" for him to sit. It is, as the courts say, a matter confided to the conscience of the particular judge.

The union intended to ask the Supreme Court to review the case. The Supreme Court did grant review and reversed, in part, unanimously. In the Supreme Court, Justice Goldberg, who represented this union some years before when he was in private practice, did not participate.

There has been an effort based on selected excerpts from letters to create the impression that Judge Haynsworth was cleared of any charge of conflict of interest in connection with the *Darlington* case. It is evident, I think, from the facts, that he is cleared of a quite different charge.

(The text of Miss Eames' written statement follows:)

TESTIMONY OF PATRICIA E. EAMES, GENERAL COUNSEL, TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, BEFORE THE SENATE JUDICIARY COMMITTEE

My name is Patricia Eames. I am General Counsel of the Textile Workers Union of America, AFL–CIO (TWUA). From 1958 through June of 1964, the period as to which I am about to testify, I was Assistant General Counsel of TWUA. In that capacity, I had occasion to correspond with the then Chief Judge of the United States Court of Appeals for the Fourth Circuit regarding Judge Clement Haynsworth. That correspondence came about as follows:

In 1956 Darlington Mfg. Co. owned and operated a textile mill in Darlington, S.C. It was one of 27 mills controlled by Deering Milliken & Co. (See *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 265.) Textile Workers Union of America won an NLRB election at the Darlington plant, and Deering Milliken closed the plant. Lengthy and involved NLRB and court proceedings ensued.

A preliminary phase of the matter was before the Court of Appeals in 1961, with Judge Haynsworth writing the Opinion. 295 F. 2d 856.

The case was argued on the merits before the Court of Appeals on June 13, 1963, and was decided on November 15, 1963. (See *Darlington Mfg. Co.* v. *NLRB*, 325 F. 2d 682.) The Court of Appeals held, 3–2, that "a company has the absolute right to close out a part or all of its business regardless of anti-union motives." (This language is the Supreme Court's summary of the holding of the Court of Appeals. See 380 U.S. 263, 268.) Judge Haynsworth joined in the majority opinion, which was written by Judge Bryan.

Subsequent developments appear from correspondence which is submitted to the Committee herewith as appendices 1 through 10. This correspondence speaks for itself. I would like, however, to point out the following:

1. The charge against Judge Haynsworth, made in an anonymous telephone call to the Union, in which I took the call for the Union, was as follows:

"I believe that you should know that Judge Haynsworth, who voted against your Union in the Deering Milliken case is the First Vice President of Carolina Vend-A-Matic Company, and that two days after the decision in the Deering Milliken case, Deering Milliken cancelled its contracts with the company or companies which previously supplied vending machines to all of the numerous Deering Milliken mills in the Carolinas, and proceeded to sign a new contract with the Carolina Vend-A-Matic Company pursuant to which that company would supply vending machines to all Deering Milliken mills."

I wrote to Judge Sobeloff to report this charge, and the language quoted above is from my letter to Judge Sobeloff. (Appendix 1, letter from Eames to Sobeloff dated December 17, 1963.)

Counsel for Deering Milliken interpreted this language as charging the company "with bribing, or attempting to bribe, a member of the Federal Judiciary." (Appendix 6, letter of January 17, 1964, from Stuart N. Updike to Judge Sobeloff.)

2. This accusation was not substantiated, and was indeed disproven, by the facts reported to Judge Sobeloff by counsel for the companies and by Judge Haynsworth. Nevertheless, the companies and Judge Haynsworth did disclose the following:

Judge Haynsworth was First Vice President of Carolina Vend-A-Matic Co. when the first *Darlington* case was argued and decided; and was still First Vice President when the second *Darlington* case was argued, though be resigned before the second decision was handed down. Carolina Vend-A-Matic had vending installations in Deering Milliken plants from 1958 on, which had average weekly gross sales of $974. In August, 1963, some two months after the second *Darlington* argument, Carolina Vend-A-Matic secured the vending business in another Deering Milliken plant, assertedly on the basis of competitive bidding. This vending installation produced an average weekly gross of $1,000. During the same period, i.e., the summer of 1963, Carolina Vend-A-Matic bid unsuccessfully on two other Deering Milliken plants. The letter to Judge Sobeloff from counsel for Deering Milliken stated:

"We are, of course, in no position to deal with the allegations concerning Judge Haynsworth's ownership in Carolina Vend-A-Matic * * *." (Letter of January 17, 1964, from Stuart N. Updike to Judge Sobeloff.)

Judge Sobeloff's final letter to the Union (Appendix 10, February 18, 1964) does not reveal whether or not Judge Haynsworth had made any statement to his colleagues regarding ownership in or any salary from Carolina Vend-A-Matic.

3. The Union promptly wrote Judge Sobeloff acknowledging that the facts set forth in the letter from counsel for Deering Milliken "established that Deering Milliken did not throw its vending machine contracts to Carolina Vend-A-Matic as was alleged to our union ou November 20." In effect, the Union apologized. (Appendix 9, letter of February 6, 1964, from Patricia Eames to Judge Sobeloff.)

4. The facts revealed by company counsel and by Judge Haynsworth did and do, however, raise the question whether Judge Haynsworth should have disqualified himself in the *Darlington* case. The U.S. Code, Title 28, provides:

"Section 455. *Interest of justice or judge*

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial iuterest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

The Union did not pursue the question whether Judge Haynsworth should have disqualified himself. In droppiug this matter it was influenced by the following considerations:

(*a*) The Uniou had relayed to the Court a much more serious charge which had been proven false. It was evident that the judges were not pleased with the Union; and the Union would inevitably be a litigant before those judges for years to come.

(*b*) The U.S. Code leaves it to the judge to determine whether, "in his opinion" it is "improper" for him to sit. It is, as the courts put it, a matter confided to the conscience of the particular judge.

(c) The Union did not and does not have all the facts. We did not then know that Judge Haynsworth had a large ownership interest in Carolina Vend-A-Matic. We did not then know that Judge Haynsworth's law firm had been, while he was with the firm, and still was, counsel to Deering Milliken mills.

(d) The Union intended to ask the Supreme Court to review the case. The Supreme Court did grant review, and reversed, in part, unanimously. In the Supreme Court Justice Goldberg, who had represented this Union some years before when in private practice, did not participate.

5. There has been an effort, based on selected excerpts from the letters, to create the impression that Judge Haynsworth was cleared of any charge of conflict of interest in connection with the Darlington case. It is evident that he was cleared of a quite different charge.

(The material attached as appendixes 1 through 10 appears in the record of the first day of the hearings.)

Senator ERVIN. As a matter of fact, though, the fact that he had been first vice president of Carolina Vend-A-Matic stood up like a sore thumb to anybody who read these letters, and everybody had complete knowledge of that, including Judge Sobeloff.

Miss EAMES. That was the only fact about his interest which we knew about; yes.

Senator ERVIN. Now, Judge Sobeloff said that—he evidently had conversations with Judge Haynsworth. He said:

However unwarranted the allegations since the propriety of the conduct of a member of this Court has been questioned—

Now the propriety, that is not the legality, but the propriety—

I am today at Judge Haynsworth's request and with the concurrence of the entire Court sending the file to the Department of Justice together with an expression of our full confidence in Judge Haynsworth.

That letter was written to you and you got a copy of it.

Miss EAMES. It is an appendix to my testimony which I just moved be admitted.

Senator ERVIN. Now you know that the firm of McLeondon, Brim, Holderness & Brooks, have a great many lawyers working for them, haven't they?

Miss EAMES. I will take a look at their letterhead and see how many.

Senator ERVIN. A great many, and a great many whose names don't appear on the letterhead, I think.

Miss EAMES. They have 11 on the letterhead.

Senator ERVIN. There are a good many more, because I was offered a partnership in that firm along about 1942 or 1943, and I went down and interviewed them, and they had a lot of young lawyers working for them.

I also found at that time that the man that supervised the doing of all the work in connection with drawing corporate charges and the like was Bill Holden, who unfortunately was killed last year in a motorboat accident, and the evidence before us is that Bill Holden was the man that supervised the drawing of this corporate charger for the subsidiary of Vend-A-Matic in North Carolina. The member of the firm who said he never knew anything about it was Thornton Brooks, wasn't he?

Miss EAMES. Yes. The fourth man down the list wrote the letter. It was the first three men on the letterhead who had been the incorporators.

Senator ERVIN. It is quite conceivable that a firm that had 10, 12, 20, or 25 members or employees, that each one of them would not know exactly what the other one had done, isn't it?

Miss EAMES. I would say that it is almost inconceivable that the fourth partner in a firm would not know what the first three partners had just done.

Senator ERVIN. Well, I practiced with my father for a long time with just two of us in the firm, and I did many things that for a long time he did not know I had done. Knowing Thornton Brooks as I do, I would say there is no real substantial basis for questioning his statement that he did not know anything about this. That is all I have.

Mr. POLLOCK. It seems that we are missing the whole point, Mr. Chairman, and that is whether Judge Haynsworth should not have disqualified himself in this case, knowing that he was an officer and knowing that he did own stock in a busines making profit on a company that had a case before his Court.

Miss EAMES. I believe, Senator, that you said yesterday that when you were a judge, you always announce to the parties if you have been counsel to one of the parties before it enters suit. Now here is a case where Judge Haynsworth had been counsel to Deering Milliken and did not reveal it to us. And I am sure he did not live up to the standards that you set for yourself.

Senator ERVIN. Were you present when the case was argued?

Miss EAMES. Yes, sir.

Senator ERVIN. That is all. I think if I was a lawyer and I knew that a judge who sat on a case had been the vice president of an organization involved in any way, I would have investigated that matter and I would have raised the point. I infer the reason you did not raise it was because you did not think there was a place for it.

Miss EAMES. That was not my reason. I stated what my four reasons were. My judgment was I was acting in the best interests of my client, and I would say that the fault here is with the man who concealed his interest from the parties, not those who made a professional judgment as to what was the best representation of their client.

Mr. POLLOCK. Thank you, Mr. Chairman.

Senator HART. Mr. Chairman, I apologize for trying to live with a schedule that can't be lived with. The Senator from Indiana had asked me during the noon recess if he was not here to please address a half dozen questions, and, Mr. Chairman, with your leave, I shall.

In the earlier sessions of the hearings, Judge Haynsworth and Senator Bayh went over a list of clients of Carolina Vend-A-Matic. A considerable number of them were identified as textile plants.

Can you locate there in the list of some 40-odd clients——

Mr. POLLOCK. Senator, we just got a copy of it several hours ago. Senator Bayh, before he left, asked us whether we could identify these companies. We told him that, having examined it thus far, we find that over 30 of those companies are textile plants, 30 out of the 46.

Senator HART. Will you identify each of the 30?

Mr. POLLOCK. We can identify and send them in or we may have it now, I don't know.

Senator HART. I think without delaying the proceedings unduly, if either now or as you leave, Miss Eames might be able to.

Miss EAMES. May I make a mechanical suggestion, Senator? Perhaps Mr. Pollock can orally sum up the situation for you, and perhaps you could reserve an exhibit number so that we could submit a written list by mail.

Senator HART. Very good. That is a useful suggestion. Now let me, as you go along in your comment, indicate the specific concern that we wanted to raise by these questions. To the extent that you are now able, please identify those plants which are organized by name and which of them are represented by you, the textile workers.

Mr. POLLOCK. Of all the textile mills that are listed, none are organized. Of the other plants that are listed, in two of them unions have won elections but have not yet been certified and all of the others are nonunion. In other words, the whole 46 plants where Vend-A-Matic has installations are unorganized mills, mills without unions.

Senator HART. What is the reference to the two that had elections and the unions prevailed? They are not yet organized or they have not yet been certified?

Mr. SWAITY. The two that are in question, one is the SCM, where an election was held roughly 2 years ago in Orangeburg, S.C. There the certification has been made, but they are unable to obtain a contract from the company. There is a long history of antiunionism in the background of this firm.

The other plant where an election has been held—I should say this is not a textile mill. SCM is not a textile mill. The election there was won by the Communications Workers of America. The second firm where an election was held was the Owens Corning Fiberglas. The election has been contested by the company. That case is now, I think, in its 2d year, and is before the NLRB or the courts, I am not sure which.

Mr. POLLOCK. There is one plant on this list, the Buaffalo Mills of Union, S.C., which is part of the United Merchants chain, where we won an election back in 1954 and we don't have a contract yet.

Senator HART. You have characterized the labor relations at SCM. How would you characterize the labor relations of the 30-odd textile mills?

Mr. POLLOCK. Not having fully studied this list, because it has not been in our possession long enough, I might say that listed here are a number of mills that were formerly located in the north, which were under contract with our union and our relationship was excellent.

Since they liquidated their northern operations and moved into the south, these same companies have now been caught up in this web of conspiracy, and they are just as vicious toward their workers trying to organize as any other one of the big southern chains.

Senator HART. Would that characterization be applicable also, Senator Bayh inquires, with respect to the J. P. Stevens, Dan River, and Burlington?

Mr. POLLOCK. I see one, Delta Finishing Co., which was formerly located in my hometown, Philadelphia, where we had it organized back around 1937. It liquidated and went south. It is now part of the J. P. Stevens chain. We have attempted to organize it several times down there, but because of the coercion and intimidation of this company, we have been unable to help these workers when they seek our help to form a union.

Senator HART. Have you had any experience with Dan River Mills or the Burlington Industries?

Mr. POLLOCK. The Dan River Mills in Dan River, Va., happens to be organized and are under contract with our competing union in the AFL-CIO, known as the United Textile Workers Union. We have two of the plants, I guess, left now in Clifton, S.C., under contract with our organization.

Senator HART. Burlington?

Mr. POLLOCK. Well, the Burlington Mills have assorted records, too, because in all the plants we had organized in that company, they either liquidated or moved. The only ones that are organized now are those that they bought or merged with their chain subsequent, and which had been under contract with our union for many, many years, like the Erwin Mills in Erwin, N.C., that have been under contract with our union for over 20 years. We still have a contract with that plant.

We have a couple in Pennsylvania, the Atwater Plant in Pennsylvania, which we also had organized in the early thirties. They were taken over by Burlington.

The union is still in that plant, but the fact of the matter is in the Burlington chain they have 124 plants, and 72,000 workers, and I would give an estimate of about 2,000 people that are in plants that we have contracts with of these three plants out of the 72,000 they have.

J. P. Stevens Co. have none of their plants organized. They are the second largest textile chain. They have 75 plants with 48,000 employees, and we have none of them organized.

We had a campaign on part of that chain since 1963, and the history is, as I have said in my testimony, that they have fired over 102 people in addition to all of the other coercive conduct carried on, and they have lost seven Labor Board cases that have gone up through the courts, even to the Supreme Court, and they have lost all of the cases.

They have just reimbursed some of these workers over $1 million, and they have still got more to go. This is an indication of how desperately and to what expense they are willing to go in order to keep their people unorganized.

Senator HART. Miss Eames, while I was out I did not have an opportunity to hear you, but is there anything you would care to add at this time?

Miss EAMES. No, thank you, sir.

Senator HART. Thank you, Mr. Chairman.

Senator HRUSKA. Miss Eames, you of course knew, according to your letter, and I quote, "We are informed that he (Judge Haynsworth) has been the first vice president since the company was founded." That was your information when you wrote the letter December 17, 1963, was it not?

Miss EAMES. That is correct.

Senator HRUSKA. You have so recited.

Miss EAMES. That was the only fact about his connection that had not been concealed from us.

Senator HRUSKA. And, of course, you knew that he was a director in the company. That information is in the letter of February 18 from Judge Sobeloff. He says that——

Miss EAMES. That was the first we had information about that, yes.

Senator HRUSKA. Yes, and he resigned as a director pursuant to the resolution of the Judicial Conference of the United States that "No justice or judge of the United States shall serve in the capacity of officer, director, or employee of a corporation organized for profit."

Miss EAMES. Mr. Hruska, let me correct myself. We knew that he had been a director at the same time that we knew that he had been first vice president.

Senator HRUSKA. Yes. Well, the law of South Carolina, I think the law of virtually all States, is that when a corporation is formed, the board of directors is chosen from among subscribers to the stock of the corporation.

Since that is in the knowledge of lawyers generally, I presume with you, a lawyer of some competence and some attainment, why didn't that give notice to you that he was also a stockholder in a corporation?

Miss EAMES. Senator Hruska, I know that States vary in their requirements as to stock ownership by directors, and as I told Senator Ervin, I could not have imagined that a judge would be a one-seventh stockholder in a company that had an interest in a case he was sitting on and not have disclosed it. The fact that he sat silent certainly led me never to dream that he would have been a major holder.

Senator HRUSKA. Could you have imagined a judge who was a director of the corporation who was not a subscriber to the corporation's stock?

Miss EAMES. Yes, sir.

Senator HRUSKA. Of which he was first vice president?

Miss EAMES. Yes, sir.

Senator HRUSKA. You could?

Miss EAMES. Yes, sir.

Senator HRUSKA. Well, that would be illegal. It would not be a legal formation of a corporation unless he was a stockholder.

Miss EAMES. In many States it is legal, and I claim no special expertise as to the incorporation law of South Carolina.

Senator HRUSKA. No special expertise is necessary. The type of statute that we find in South Carolina is a type that is used generally in virtually all the States. It is the same type of statute that we have in Nebraska, for example, a State located 1,500 or 1,800 miles away from South Carolina. It is a general statutory provision.

Miss EAMES. It is a frequent one.

Senator HRUSKA. The directors are elected from subscribers to the stock of the corporation, and he was elected a director and had been the vice president, first vice president, since the corporation was formed.

Miss EAMES. Certainly that is true of the law in many States, but as I say, it never occurred to us that he would conceal a significant portion of ownership, and so we never had occasion to look into it.

Senator HRUSKA. Nothwithstanding your knowledge that since the formation of the company, since the company was founded, he had been first vice president of the company you were told.

Miss EAMES. That is correct. We were told that.

Mr. POLLOCK. Senator Hruska, I think we are still getting away

from the point. Whether or not our attorney knew it, she is not going up to the Supreme Court.

Judge Haynsworth has been honored with one of the appointments to the Highest Court in this land, and it seems to me that when we are seeking people to sit on that Court, that we ought to dig into their background, and our point is he should have revealed the fact that he was a stockholder, and he was making money out of the company that had a case before his court, so that we could determine what to do about it.

Senator HRUSKA. There is no canon, nor is there any statute that calls for a disclosure of stockholding in a supplier to a company that has a case in court, and if you think of one, I would like it to be cited. We have been told by eminent legal authorities here that that is not the law of the land.

Mr. POLLOCK. Is your code of ethics such that you approve that a judge should not reveal that he has a financial interest in the company that comes before his court where a decision has——

Senator HRUSKA. His company was not before the court. The Vend-A-Matic Co. was not before the court.

Mr. POLLOCK. The Deering Milliken Co. was before the court.

Senator HRUSKA. The company that supplied services.

Mr. POLLOCK. The Deering Milliken Co. was before the court.

Senator HRUSKA. Yes, but not the Vend-A-Matic.

Miss EAMES. He had an interest in Deering Milliken by reason of seeking its business.

Senator HRUSKA. Not the Vend-A-Matic Co., that is one that he owned stock in.

Mr. POLLOCK. Haynsworth was a stockholder in the Vend-A-Matic Co.

Senator HRUSKA Yes.

Mr. POLLOCK. They had business and were seeking business from the Deering Milliken Co.. and the Deering Milliken Co. was before their court.

Senator HRUSKA. Of course. That is just the point I make. The Vend-A-Matic Co. was not in the same court. It did not have a case in court.

Mr. POLLOCK. But the decision of that court may affect the amount of money the judge would make out of the business his company was doing with them.

Senator HRUSKA. Exactly. But we have had very eminent legal counsel sitting in the chair you now occupy who say there is no canon, nor is there any law, nor is there any court rule, which says that a judge must disclose his interest in a company that is a supplier to a second company which is in court. There isn't any such law. We know of none.

Miss EAMES. Senator Hruska, I think that that is a characterization.

Senator HRUSKA. The Senator from Michigan has been here.

Senator HART. The Senator from Michigan might state there was a very eminent judge sitting in that chair who told us he thought if he thought if he had been in Judge Haynsworth's spot, he certainly would not have held that Brunswick stock, because of Canon 26. I did not hear anybody get so excited with that disclosure, but it gives me an opportunity to remind all of us that that is what the testimony was.

Senator HRUSKA. And yet Judge Winter sat in that chair and said that there isn't any canon that is violated, and Judge Winter is a pretty estimable fellow in the law profession and in the judiciary.

Senator HART. I think Judge Winter was telling us if he had it to do, he thought Canon 26 counseled him against doing what Judge Haynsworth did with respect to that Brunswick stock.

Senator HRUSKA. That was in connection with the Brunswick stock, that is right.

Senator HART. That is right.

Senator HRUSKA. Even there he did not say that any canon was violated. That is my recollection of the record.

Senator HART. It is an interesting exchange, and those who are sensitive about these things will read it, I am sure, carefully.

Senator HRUSKA. I am sure that is right.

Senator ERVIN. Judge Winter testified positively that in his opinion nothing had happened that would justify anything that would not confirm Judge Haynsworth.

Senator HART. Notwithstanding Canon 26.

Miss EAMES. Of course, our interpretation of the canons and the statute parallel that which was given. I believe the interpretation of what the statute means is one open to argument. I recognize Mr. Hruska is persuaded by one argument. We are persuaded, perhaps we have higher standards, that Mr. Bredhoff was correct.

Senator HRUSKA. One other point on the matter of how many employees there were with Deering Milliken, and how many were serviced by this Vend-A-Matic Co. The testimony at page 20 of the transcript indicates the Chairman asked:

> As I understand, of 19,000 employees, you did vending business with approximately 700 or slightly less than 700 employees?
> Judge HAYNSWORTH. I believe that is right.

I just put that in by way of comparison with the estimate which you gave. Your statement was 2,000, wasn't it?

Mr. POLLACK. My estimate was not plants covered by Vend-A-Matic.

Senator HRUSKA. What was it?

Mr. POLLOCK. We were talking about plants that were organized.

Senator HRUSKA. Oh, excuse me. I thought it was——

Mr. POLLOCK. It had no relationship——

Senator HRUSKA (continuing). I thought it was the number of employees.

Mr. POLLOCK (continuing). To the Vend-A-Matic installation.

Senator HRUSKA. I beg your pardon. I stand corrected. I have no further questions, Mr. Chairman.

Senator ERVIN. If there is no objection, I have a statement relating to the *Darlington* case.

THE DARLINGTON CASE

Much has been said during these hearings about the *Darlington Manufacturing Company* case.

THE ISSUES IN THE DARLINGTON CASE

This case presented these questions: (1) whether Darlington's complete and final withdrawal from business was a violation of the National Labor Relations Act. (2) If not, whether Darlington's withdrawal from business, even though final and complete, was a violation of the Act because of relations alleged to exist between Darlington and the Deering Milliken interests, which controlled some

16 or 17 other textile companies operating some 26 or 27 mills. Stating the second question more succintly, were Darlington and Deering Milliken a single employer.

The test of whether two or more businesses constitute a single employer within the meaning of the National Labor Relations Act has been laid down by the National Labor Relations Board, which I shall hereafter call the Labor Board, as follows:

"It is now well established that for two or more legal entities to constitute a 'single employer' for purposes of assessing liability for unfair labor practices it must be shown that there was a sufficient degree of common ownership and common control of labor relations and operations so that it may be said that they engaged in a common enterprise . . ."

Under the law, a common enterprise is an enterprise in which two or more individuals or corporations share equally or alike.

EVENTS OUT OF WHICH THE CASE AROSE

To understand the issues involved in the *Darlington* case, a knowledge of the background of the case is necessary. Darlington was an old textile plant, which began operations in 1883. Originally, none of the family of Roger Milliken had any interest in Darlington. In 1937, however, Darlington went into bankruptcy and was reorganized and continued in business because Deering Milliken interests accepted stock in the reorganized company in lieu of debts owing them by Darlington. In 1956, Darlington had 150,000 shares of stock outstanding. Of this stock 41.4% was held by a sales corporation, Deering Milliken and Company; 18.3% by the Cotwool Manufacturing Company, a textile manufacturing corporation controlled by Deering Milliken interests; 6.4% by Roger Milliken and the immediate members of his family; and 2.9% was held by directors and employees of Deering Milliken and Company. The remaining outstanding stock, which totaled 31%, was held by 200 other stockholders who had no connection whatever with Deering Milliken interests or any textile plant operated by them.

Darlington did not have a very prosperous career following its reorganization. It managed to survive, however, because of economic benefits accruing to the textile industry during the Second World War and the Korean Conflict. During 4 of the 5 years preceding its dissolution, it managed to earn only a 3% return on its invested capital. During the year of its dissolution, it lost $40,000, and was confronted with the prospect of losing $240,000, additional during the following year.

As a consequence of these things, the board of directors, which consisted of Roger Milliken and three other directors affiliated with Deering Milliken interests and three independent directors, employed an efficiency engineering concern to devise a plan which would enable Darlington to continue in business as a viable economic entity. The engineering concern recommended to the directors of Darlington as the only plan which would continue Darlington in existence as a viable economic entity the expenditure of considerable sums of money to renovate its plant and to reequip it with new machinery. It also stated in its report to the directors that it was necessary for Darlington to obtain more efficient services from its employees if it were to survive economically. Pursuant to the recommendations of the engineering concern, Darlington began to renovate its plant and to purchase new machinery.

At this time, organizers of the Textile Workers Union of America appeared upon the scene and began an organizing campaign in which they pledged to the employees of Darlington that the union would not permit Darlington to carry out the recommendations of the engineering firm if a majority of the employees of Darlington chose the union as their bargaining agent in an election to be held under the direction of the Labor Board.

This election was held on September 6, 1956, and the union won the election by a 6-vote margin out of the 510 votes cast by Darlington employees. In view of the financial losses Darlington was currently sustaiuing, the board of directors concluded that the arrival of the union and its pre-election pledge that it would not permit Darlington to do the things which the engineering concern had detailed as necessary to its survival as a viable economic entity doomed any prospect for successful operation of Darlington's plant in the future. Accordingly, the 7 directors, including the 3 having no relationship whatever to the Deering Milliken interests, met on September 12, 1956, and voted to recommend to the stockholders that they dissolve the corporation and thus salvage for themselves their respective equities in the assets of the company.

On October 17, 1956, the stockholders met and voted by 134,911 shares to 3,774 shares to dissolve the company and divide the assets remaining after the payment of its debts among the stockholders according to their respective equities. It is noteworthy that virtually all of the 200 independent stockholders voted for Darlington to take this action.

During the next 6 weeks, Darlington completed the filling of its existing orders and discharged its employees. The plant was closed on November 24, 1956, and shortly thereafter, i.e. on December 12 and 13, 1956, Darlington sold all of its equipment and machinery, which had been dismantled, at public auction. Darlington has not operated any plant anywhere since that time, and shortly after its cessation of business, it was dissolved as a corporation pursuant to the law of South Carolina.

PROCEEDINGS BEFORE THE LABOR BOARD

Meanwhile, on October 16, 1956, the Textile Workers Union filed a charge against Darlington alleging that it had committed an unfair labor practice in going out of business.

The General Counsel of the Labor Board issued a complaint on this charge and the Labor Board assigned one of its most competent and diligent trial examiners, Lloyd Buchanan, to hear the evidence offered by the parties in relation to the charge.

The hearings were begun in January, 1956. During the course of the hearings, the Textile Workers Union offered evidence which it contended would show that Darlington was one of a chain of mills controlled by Deering Milliken Company, the sales corporation. The trial examiner rejected this evidence on the ground that it was not competent under the allegations made by the union in the original charge.

On April 30, 1957, the trial examiner filed his original intermediate report in which he found that the directors and the stockholders of Darlington had sufficient economic reasons to justify its going out of business and distributing its assets among its stockholders in accordance with their respective equities. He concluded, however, that Darlington had committed an unfair labor practice because it went out of business at the particular time it did because of the advent of the union. He found further, however, that Darlington would have had to have gone out of business within the immediate future because of the dire economic situation confronting it. He concluded that Darlington could not be required to reinstate its discharged employees because it no longer had a manufacturing plant, and he recommended that the Labor Board refrain from allowing any allegedly lost wages because of the uncertainty of the time at which Darlington would have been compelled by economic circumstances to close if it had elected to operate subsequent to the advent of the union. The Labor Board took no action upon this intermediate report until December 16, 1957. On that date, the Labor Board, by a 3 to 2 vote, entered an order postponing any decision on the merits of the proceeding and remanded the proceeding to the trial examiner with direction that he take evidence concerning any relationship between Darlington and Deering Milliken and Company, Inc., the sales corporation.

Pursuant to the order of remand, Deering Milliken and Company, the sales corporation, was made a party to the proceedings, and the trial examiner thereupon conducted hearings in which 2,500 pages of additional testimony were taken and 400 pages of exhibits were received. On December 31, 1959, the trial examiner filed a supplemental intermediate report in which he found that Deering Milliken and Company did not occupy employer status with Darlington and recommended the dismissal of the charges as to Deering Milliken and Company.

The Labor Board took no action upon the trial examiner's supplemental intermediate report between December 31, 1959 and January 9, 1961.

Meanwhile, it was revealed by the press that in June, 1960, Deering Milliken and Company, which had always been a sales corporation and not a manufacturing company, and Cotwool Manufacturing Company, a textile manufacturing corporation controlled by the Deering Milliken interests, had merged into a new corporation under the name of Deering Milliken, Incorporated.

At some time thereafter, the Textile Workers Union filed a motion with the Labor Board asking the Board to remand the proceeding to the trial examiner to take evidence concerning the merger of these two corporations.

On January 9, 1961, the Labor Board, by a 3 to 2 vote, remanded the case to the trial examiner for this purpose.

PRECEEDING LITIGATION

Thereupon the merged corporation, i.e. Deering Milliken, Incorporated, brought a suit in the U.S. District Court for the Middle District of North Carolina against Reed Johnston, Regional Director of the Labor Board for the areas embracing North and South Carolina, praying that he be enjoined from carrying out the order of remand. The U. S. District Court for the Middle District of North Carolina issued an injunction forbidding the Regional Director of the Labor Board to carry out the order of remand and the Regional Director appealed from this judgment to the Court of Appeals for the 4th Circuit.

The decision of the Circuit Court, which was entitled *Deering Milliken, Incorporated* v. *Johnston, as Regional Director of the Labor Board*, and which is reported in 295 F 2d 856, was handed down on October 13, 1961 and was written by Judge Haynsworth. The opinion states, in substance, that the proceeding had been pending before the Labor Board since about October, 1956, and that the Labor Board had not performed its statutory duty to decide the proceeding within a reasonable time. Despite these statements, whose truth cannot be disputed, Judge Haynsworth modified the injuction issued by the U.S. District Court for the Middle District of North Carolina and authorized the Regioual Director to carry out the remand order to the extent of requiring the trial examiner to take evidence concerning the merger of the two corporations and other circumstances relating thereto.

I digress to note that this decision was never appealed to the Supreme Court and has never been overruled by the Supreme Court in any other case. Manifestly, Judge Haynsworth's action in this instance did not shown any antiunion bias on his part because the decision was favorable to the union.

FURTHER PROCEEDINGS BEFORE LABOR BOARD

Subsequent to this decision, the trial examiner conducted further hearings and filed a third report in which he reached these conclusions: (1) That Darlington had violated the National Labor Relations Act by going out of business at the particular time it did because it was motivated in part by the union victory, but inasmuch as it had not been shown that Darlington would, in the existing economic circumstances, have continued to operate its mill for any definite additional period of time, any financial assessment against it would be punitive in nature and should not be made; and (2) That the General Counsel of the Labor Board and the union had "clearly failed" to demonstrate that Darlington and Deering Milliken constituted a single employer within the meaning of the Act. Subsequently, to wit, on October 18, 1962, the Labor Board handed down its decision with members Rodgers and Leedom dissenting. The majority of the Labor Board ruled, in snbstance, that even though it had genuine economic reasons for going out of business, Darlington violated Section 8(a)(3) of the Act because the closing of its plant was partly attributable to the employees' selectiou of the union.

It is to be noted that the 3 to 2 decision of the Labor Board required Darlington, in essence, to ignore the fact that in addition to its other economic woes, a union had appeared in its plant which had pledged itself to defeat the only program by which Darlington and the impartial engineering concern believed Darlington could survive economically.

The 3 to 2 majority of the Labor Board also reversed the trial examiner on the single employer issue and held that Darlington and Deering Milliken were a single employer and that in consequence Deering Milliken were legally responsible for Darlington's action.

THE FIRST DECISION OF THE CIRCUIT COURT IN THE DARLINGTON CASE

The decision of the Labor Board was appealed to the U.S. Court of Appeals for the 4th Circuit, sitting *en banc*, which by a 3 to 2 vote refused to enforce the Labor Board decision.

The decision of the Court of Appeals was written by Circuit Judge Bryan, one of the ablest jurists of our land, and is reported in 325 F. 2d 682. The basis of the decision of the Court of Appeals is stated in these words in Judge Bryan's opinion: "To go out of business *in toto* or to discontinue it in part permanently at any time, we think, was Darlington's absolute prerogative." The Court of Appeals did not pass upon the single employer issue because of its conviction that the closing of Darlington did not constitute an unfair labor practice regardless of whether Darlington was a single legal entity or a part of the Deering Milliken chain.

The opinion and decision of the Circuit Court in the *Darlington* case was in accord with the overwhelming majority of decisions of U.S. Courts of Appeals in the varions circuits. It seems appropriate at this time to call attention to three of these decisions.

The first is *Jay's Foods' Inc. v. NLRB*, 202 F.2d 317, 320, a 7th Circuit Court decision, which raised the issue as to whether the employer had committed an unfair labor practice in eliminating a part of its business, namely, an automobile repair shop which had been unionized. The Court declared that

"An employer has a right to consider objectively and independently the economic impact of unionization of his shop and to manage his business accordingly. Fundamentally, if he makes a change in operations because of reasonably anticipated increased costs, regardless of whether they are caused by or contributed to by the advent of a union or by some other factor, his action does not constitute discrimination within the provisions of section 8(a)(1), (3) and (5) of the Act."

The second is *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 172, 174, a 2nd Circuit decision, where the employer was charged with an unfair labor practice because he closed one of his plants and transferred all of his business to a second plant operated by him. The court declared that

"Respondents admit that they were something less than happy to have the Union appear on the scene at a time when economic considerations were making some sort of a change in their business operations mandatory . . .

"However, from the evidence that was admitted it is clear that the transfer of operations from Dunkirk was indeed economically necessary. Despite this, the examiner found that the move was not made solely for economic reasons but was made 'in an atmosphere redolent with hostility toward the Union, and for the purpose of discouraging membership in it', and consequently that the respondents violated section 8(a) (3).

"We are of the opinion that this last finding is an erroneous one in that it is not supported by substantial evidence and is not in accord with the law as the law has developed under section 8(a) (3) . . .

"In those sitnations where a change or discontinuance of business operations is dictated by sound financial or economic reasons the courts have refused to find that section 8(a) (3) has been violated even though the employer action may have been accelerated by union activity."

The third case is *NLRB* v. *R. C. Mahon Company*, 269 S. 2d 44, 47, a 6th Circuit decision, where the employer was charged with an unfair labor practice by eliminatiug one of his departments, namely, a plant guard department which had been unionized. In that case, the court declared that

"We find nothing in the National Labor Relations Act which forbids a company, in line with its plans for operation, to eliminate some division of its work. As held in *National Labor Relations Board* v. *Adkins Transfer Company, Inc.*, supra, an employer faced with the practical choice, either of paying enhanced wage rates demanded by a union or of discontinuing a department of its business, is entitled to discontinue. The findings of fact and conclusions to the contrary made by a majority of the Board are not supported by substantial evidence on the record considered as a whole nor do they accord with the applicable law."

THE SUPREME COURT DECISION IN THE DARLINGTON CASE

The Labor Board and Textile Workers Union appealed the Circuit Court decision to the Supreme Court of the United States. As appears by the decision of the U.S. Supreme Court, which is reported in 380 U.S. 263 and was handed down on March 9, 1965, these two legal issues were raised by the appeal: (1) Whether Darlington's closing constituted an unfair labor practice under the National Labor Relations Act if Darlington constituted a separate enterprise; and (2) Whether Darlington's closing constituted an unfair labor practice nnder the Act if Darlington and Deering Milliken were a single employer.

I argued the first of these issues before the Supreme Court and Mr. Stuart Updike argued the second. In my appearance before the Supreme Court, I advanced these alternative arguments to justify the position that Darlington had an absolute right to go out of business if it constituted a separate enterprise:

1. That any private employer in America has an absolute right under the National Labor Relations Act itself to go out of business for any reason satisfactory to him.

2. That if the National Labor Relations Act shonld be interpreted to deny any private employer in America this absolute right, the Supreme Court would have

to adjudge the act unconstitutional upon these two grounds: (1) The act would exceed the legislative power vested in Congress by the Interstate Commerce Clause; and (2) The act would deprive the private employer of his property without due process of law in violation of the Fifth Amendment.

Manifestly, the power of Congress to regulate interstate commerce does not authorize it to regulate a private business after it completely and permanently ceases the operation of a business affecting interstate commerce. Moreover, it is obvious that Congress would deprive a private business concern of its property without due process or if it undertook to compel against its will the concern to continue it operation for the purpose of giving employment to individuals having no interest in the property.

The Supreme Court sustained my initial argument by saying that: . . . "We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason. We conclude that the cause must be remanded to the Board for further proceedings." . . .

The Supreme Court further declared:

"While we thus agree with the Court of Appeals that viewing Darlington as an independent employer the liquidation of its business was not an unfair labor practice, we cannot accept the lower court's view that the same conclusion necessarily follows if Darlington is regarded as an integral part of the Deering Milliken enterprise.

"The closting of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place . . . By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have forseen that such closing would likely have that effect."

The Supreme Court adjudged that the Labor Board had failed to make findings and rulings with respect to whether the requisite "purpose" and "effect" had in fact existed in respect to the closing of Darlington and ordered the proceeding remanded to afford the Labor Board an opportunity to make findings and rulings on these matters. It noted that the Circuit Court had not passed on the question whether the evidence snstained the finding of the Labor Board that Darlington and Deering Milliken were a single employer within the meaning of the Act and observed that if it became necessary for it to do so, the Circnit Court conld determiue that question after the Labor Board had made findiugs and rulings with respect to the requisite "pnrpose" and "effect". The Supreme Court clearly stated that nothing in its opinion remanding the proceeding conld be construed to express any opinions on any questions of fact.

I take issue with the assertion made in these hearings that the Supreme Court unanimously reversed the 1963 decision of the Circuit Court of Appeals. To be sure, it disagreed with the Circuit Court's view concerning the right of an employer to go ont of business partly even if he had a discriminatory purpose for so doing.

In legal effect, the Supreme Court reached a conclusion similar to that of the Circuit Court. It was that the Labor Board had not passed upon certain issues essential to the determination of the proceeding, and for that reason no order enforcing its decision could be entered.

FURTHER PROCEEDINGS BEFORE LABOR BOARD

Pnrsuant to the decision of the Supreme Court, the proceeding was successively remanded to the Circuit Court, the Board, and the hearing examiner. The hearing examiner conducted further hearings and made a "Trial Examiner's Supplemental Decision", in which he made these findings and this recommeudation:

"Having found and concluded on the evidence received at this hearing as well as on the record previously made and in the light of the opinion of the Supreme Court and the Board's remand order,

"1. That the persons exercising control over Darlington did not act to close it in order to discourage unionization at other Deering Milliken plants (I am now regarding them as in integral part of the Deering Milliken enterprise) or elsewhere; and

"2 That the evidence adduced does not indicate either

(*a*) That it was realistically forseeable that employees at other Deering Milliken plants or elsewhere would fear that their place or employment would be closed down if they persisted in organization activities; or

(*b*) That such other employees were in fact led so to fear, I recommend: "That any allegation or claim of violation of Section 8(a)(3) of the Act because of chilling purpose or effect as defined in the Supreme Court's opinion of March 29, 1965, with respect to employees in plants or businesses other than Darlington Manufactnring Company be dismissed."

On June 29, 1967, the Labor Board rejected the findings and the recommendation of the trial examiner by the vote of 4 of its members, the 5th member not participating.

It found that Darlington was closed for the purpose of chilling unionism in the Deering Milliken plants and that it had the effect of so doing, and that in consequence Darlington and Deering Milliken were reqnired to make the discharged employees of Darlington whole for lost wages until they obtained other employment or were placed on a preferential hiring list at Deering Milliken Mills.

THE SECOND DECISION OF THE CIRCUIT COURT IN THE DARLINGTON CASE

Darlington and Deering Milliken appealed the decision of the Labor Board to the Circuit Court of Appeals, and on May 31, 1968, the Circuit Court of Appeals affirmed the decision of the Labor Board in an opinion written by Judge Butzner and concurred in by Judges Sobeloff, Winter, and Craven. This decision is reported in 397 F. 2d 760. Judge Haynsworth wrote a concurring opinion in harmony with the majority opinion, which noted other questions that had not been passed on. Judge Bryan wrote a dissenting opinion in which Judge Boreman concurred.

I find it difficult to accept the assertion made by some in this hearing that Judge Haynsworth's vote in the 1963 decision to deny enforcement of the Labor Board's decision or his action in the 1968 decision indicate anti-labor bias on his part. His vote in the 1963 decision is in perfect harmony with the decision of the Supreme Court holding that the proceeding was not ripe for an enforcement of the Labor Board's decision at that time because the Board had failed to make findings and rulings concerning certain crucial issues, and his vote in the 1968 decision was in favor of the victory which the union achieved by that decision. Personally, I am unable to concede that any judge is biased against a party when he joins in rendering a decision in favor of that party.

The majority of the Circuit Court decreed enforcement of the Board's decision, and the proceeding is now in the hands of the Labor Board for this purpose—13 years after it originated.

It is appropriate to end this phase of my statement with some observations made by James J. Kilpatrick in a column entitled "Deering Milliken Dispute: A Landmark Case," which appeared in The Washington Star on September 11, 1969. Mr. Kilpatrick said:

"In the course of its hearings on the nomination of Clement Haynsworth to the Supreme Court, the Senate Judiciary Committee will find itself nibbling at the edges of one of the landmark cases of labor law—the great Deering Milliken case from Darlington, S.C.

"No other case quite like it has ever come along. You have to go back to Charles Dickens' fictional masterpiece, the chancery cause of *Jarndyce* v. *Jarndyce*, to find a legal proceeding so likely to interest the lawyers and to baffle the clients. The great Deering Milliken case has been pending now for thirteen years this month.

"The story actually dates from 1883, when the Darlington Manufacturing Company came into existence. Apparently the company never knew happy days. In 1937, heavily in debt, it went into bankruptcy. The Deering Milliken interests took over a two-thirds ownership at that time. The company limped through the war years, but by the early 1950's its profits were under 3 percent.

"Darlington may not have been the poorest of D–M's 27 mills, but it was among the most feeble. The company was operating in a building erected prior to 1900. It was working 40-inch looms when the market demanded wider cloth. Its print-cloth products were out of style. By early 1956, seven of its ten best customers were cutting back.

"At this juncture, the Textile Workers Union (AFL–CIO) appeared on the scene, with an intensive organizing campaign at the Darlington plant. The com-

pany strongly resisted, warning that higher production costs might kill the operation altogether, but on Sept. 6, 1956, the union won a recognition election by 258–252. It was the last straw. On Sept. 12, the Darlington directors and stockholders voted overwhelmingly to liquidate the business.

"The union at once challenged this decision. Months of hearings followed. At last, the National Labor Relations Board. in a 3–2 ruling, held that a plant closing prompted even in part by employees' union activities constitutes an unfair labor practice. The NLRB ordered Deering Milliken to make restitution.

"In November of 1963, the Fourth U.S. Circuit Court voted 3–2 to reverse the NLRB. The majority opinion was by Judge Albert Bryan; Judge Herbert Boreman and Judge Haynsworth joined him. They felt that it was Darlington's "absolute prerogative" to go out of business whenever it wished.

"Five more years of litigation followed. The Supreme Court remanded the case to the NLRB, which again ruled against Deering Milliken. At long last, in May of 1968, a still-divided Fourth Circuit Court—this time Haynsworth reluctantly concurred—directed enforcement of the NLRB order: Back pay would have to be paid.

"For the past 16 months, the NLRB regional office at Winston-Salem has been engaged in a stupendous task. It has been tracking down the 523 workers who were on the Darlington payroll in September of 1956. Some have died. About 30 caunot be located at all. Most of the workers found other employment in a few months or a couple of years after Darlington was closed and its machinery sold at auction. Some workers who were in their late 50's and early 60's never found equivalent jobs.

"Using crystal balls, tea leaves, informed guesses, Social Security records, and individual interviews, the NLRB now must draw up a backpay specification. If Darlington had stayed in business—and the company's contention is that Darlington was doomed regardless of the union's victory—how much would each worker have earned before he obtained an "equivalent" job?

"Reed Johnston, the NLRB's regional director, says his task will be done in 1970. Then his findings go to a trial examiner, thence to the NLRB, then to the courts for review, and thence, and thence . . . New platoons of lawyers will appear, representing survivors, minor children, and relatives of claimants. After thirteen years, an end is not even distantly in sight."

UNSATISFACTORY PROCEDURAL RULES GOVERNING CASES ARISING UNDER NATIONAL LABOR RELATIONS ACT

The tribunal which has the duty to decide a litigated case must apply the relevant law to the facts of the case. Since the testimony of witnesses usually puts the facts in dispute, the tribunal must have a procedure for finding the facts. The experience of generations has shown that the most reliable procedure for finding the facts from conflicting evidence is for the finder of the facts to see the witnesses and observe their appearance and demeanor while testifying. By so doing, the finder of the facts can determine most effectively the value and trustworthiness of the testimony of the various witnesses.

This procedure for finding the facts prevails in court of law where the trial judge or the trial jury finds the facts from the conflicting testimony of the witnesses and where there are methods for correcting erroneous findings of fact.

It is otherwise with respect to proceedings under the National Labor Relations Act. This Act makes the Labor Board the sole finder of the facts, hut under the controlling regulations that Board does not see the witnesses. The testimony in a proceeding under the Act is heard by a trial examiner who has an opportunity to observe the appearance and demeanor of the witnesses and who reports the testimony and his recommendations upon it to the Board in writing. The Board makes its finding of fact solely upon the basis of the written testimony presented to it by the trial examiner and has absolute and unreviewable authority to reject any recommendations made to it by the trial examiner with respect to what facts should be found.

Since the Board has no opportunity to judge the value and trustworthiuess of the testimony of the various witnesses by observing their appearance and demeanor while testifying, it is comparatively easy for the Board to reach erroneous conclusions from the conflicting testimony of the witnesses. Obviously the testimony of an Ananias and a George Washington look alike when reduced to cold print.

Another unsatisfactory rule of procedure applicable to proceedings under the National Labor Relations Act is the statutory rule which makes the findings of fact of the Board binding upon the Circuit Courts and the Supreme Court if they are "supported by substantial evidence on the record considered as a whole." As a practical matter, this means that a Circuit Court of Appeals and the Supreme Court must accept the findings of fact of the Labor Board if such findings are supported by any evidence, even though the evidence accepted by the Board is incredible in nature or is contradicted by overwhelming testimony to the contrary. This statutory rule is inconsistent with the rule governing courts of law where findings of fact must be supported by the greater weight or preponderance of the evidence.

As an inevitable consequence of the statutory rule governing proceedings under the National Labor Relations Act, a party to a proceeding under the Act has no remedy whatsoever against erroneous or biased findings of fact.

Circuit Judge Hutcheson of the Fifth Circuit made some comments upon this in his opinion in *N.L.R.B. v. Caroline Mills, Inc.*, 167 F. 2d 212, 213, when he stated that Circuit Courts are not permitted to review Labor Board proceedings to determine whether the findings of fact made by the Board "have been fairly, impartially, and justly arrived *at*:", but whether they are supported by any evidence in the case. He indicated that the findings of fact in that particular case were biased findings by saying that the case presented "the usual picture of supporting findings arrived at by a process of quite uniformly 'crediting' testimony favorable to the charges and as uniformly 'discrediting' testimony opposed."

Despite my reluctance to do so, I am compelled by truth to observe that many persons experienced in proceedings before it assert that the Labor Board which sat on the *Darlington* case is not an impartial tribunal, but on the contrary has a bias which prompts it to prefer unions over management, strong unions over weak unions, unions over dissenting members, and unions over individual employees who do not wish to be unionized. Those who make this assertion cite chapter and verse which they allege proves its truth.

THE TESTIMONY IN THE DARLINGTON CASE

I wish to make some observations at this point as to what I believe the evidence in the *Darlington* case actually showed. I will neither affirm nor deny that my views on this matter are influenced by the fact that I was an advocate in the case. I will assert, however, that my views are firmly and honestly held.

None of the members of the Labor Board or of the courts which considered the *Darlington* case saw any of the witnesses or had any opportunity to observe their appearance and demeanor while testifying. Of all the public officers involved in the case, only Lloyd Buchanan, an impartial and competent trial examiner, had this opportunity. Notwithstanding this fact, his recommendations to the Board in respect to the testimony were rejected by the Board.

As the trial examiner appraised the testimony, it failed to establish that Darlington and Deering Milliken were a single employer. I am satisfied that a majority of the members of the Fourth Circuit Court of Appeals would have concurred in his appraisal of the testimony relating to this question if the statutory rule had permitted them to look behind the finding of the Labor Board, and *make* their own appraisal of the evidence relating to this issue.

Under the decision of the Supreme Court, there could be no liability in the *Darlington* case for the closing of Darlington unless Darlington constituted a single employer with the Deering Milliken mills, and unless Darlington was closed for the purpose of chilling unionism at the Deering Milliken mills and had the effect of doing so. In the very nature of things, motivation involves the state of mind of the persons taking the action under inquiry, and must be established by inferences drawn from facts. As the trial examiner appraised the testimony, Darlington was not closed for the purpose of chilling unionism at Deering Milliken plants elsewhere, and did not have any such effect. The Labor Board rejected the trial examiner's appraisal of the evidence on these points and found as a fact that the "purpose" and the "effect" essential to liability existed.

I honestly believe that a substantial majority of the seven judges of the Fourth Circuit Court who sat in the *Darlington* case would have reached the same conclusion that the trial examiner reached if they had been permitted by law to go behind the findings of the Labor Board and make their own appraisal of the facts in respect to "purpose" and "effect."

Judge Bryan and Judge Boreman, who were familiar with all the testimony, concluded that the findings of the Labor Board in respect to the requisite "purpose" and "effect" were not supported by any evidence. They concluded that this was the only inference which could be rightly drawn from the testimony, i.e., that the directors and stockholders of Darlington dissolved the company because they honestly and reasonably believed that existing conditions made it impossible for Darlington to remain in business as a viable economic enterprise, and that common prudence required its dissolution and the distribution of its assets among the stockholders according to their respective equities. I share in full measure their views as to what the final decision in the case should have been.

To enable others to pass on this matter for themselves, I insert at this point in my remarks a copy of the dissenting opinion which expresses the views of Judge Bryan and Judge Boreman.

ALBERT V. BRYAN, Circuit Judge (dissenting):

The Supreme Court's prefatory recount of the facts, 380 U.S. 263, 85 S. Ct. 994, 13 L.Ed.2d 827 (1964), necessarily taken from the Board's findings, discloses a complete knowledge of all of the conduct and tie-ins which is now the predicate of the majority opinion. These premises the Supreme Court declared fell "short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind." The controversy was remanded to the Board to make further findings.

Nothing significantly new was introdnced *after* the remand. This is the observation of the trial examiner who heard the evidence on the return of the case to the Board. Indeed, this is manifest too in the majority's reliance now on what was said in dissent here, of course *before* the appeal. 325 F.2d 682, 689 (1963). My difficulty is understanding how our Court sees the facts as supporting "purpose and effect" where the Supreme Court could not.

A single director's, Roger Milliken, statements, writings and attitude are now imputed to the entire board of directors, and a majority of the stockholders, of Darlington by the Court to sustain the NLRB's finding that both the purpose and foreseeable effect of the plant closure was to "chill unionism" in the other Milliken plants. All of the power of Roger Milliken, and the entire linkage of Darlington with the other Milliken corporations, upon which the Court now counts, were known to the Supreme Court when it decided this case, and yet it did not think this evidence sufficient to arrive at the judgment now delivered by our majority.

The answer is that for its support the majority draws inferences and makes assumptions which are not warranted by the proof. With nothing to sustain it, the majority terms some of the Milliken units as "paper corporations". Also, it adopts a sweeping implication that their directors would do just exactly what Roger Milliken wished, for fear they be at once removed and replaced by him to register his views. This undeserved derogation of the directors stands refuted both by the absence of evidence to establish it, and by obstinate facts and testimony exactly opposite.

Darlington was closed for economic reasons according to its directors. At least they said so and gave the basis of their determination. The NLRB recognized this fact. In its supplemental decision it admitted that,

> "(a)ccording to the testimony in this case, the financial condition of Darlington was discussed at the board meeting. It was brought out that Darlington had averaged less than a 3 percent return on invested capital in the previous 5 years, including the current year in which a loss of $40,000 was expected, and that, if market prices did not rise or costs decrease, a loss of $240,000 could be anticipated in the following year."

There was no impeachment of the Darlington board's word save NLRB's argument, now accepted by the majority, that the members' votes were nothing more than echoes of Roger Milliken's partisanship. Truth is the directors were persons of conviction and *unquestioned* character. There were 7 including Roger Milliken, and 3 of them had no interest in any other Deering-Milliken corporations. The remaining 3 were connections of the Milliken family. The relationship alone does not impugn their evidence on the economic advisability of the plant closing.

The stockholders must also be found unworthy of belief, for they voted to ratify the directors' action. Additionally, the directors of Cotwool and Deering-Milliken must also be condemned in a similar fashion. Each board voted, in favor of the closure, all of the Darlington shares held by its corporation, constituting a majority of Darlington's outstanding stock.

The NLRB's supplemental decision, upheld by the court, tells Darlington that it did not have a right to liquidate after the union election but instead should have made that decision prior to the election. With the financial losses that Darlington was currently sustaining, the corporation reasoned quite realistically that the foreseeable additional costs resulting from the arrival of the union, would be simply too much for the corporation to bear. Surely this consideration may be indulged, and acted upon, without offense to the National Labor Relations Act—indeed even if it be a mistaken conclusion.

The Trial Examiner emphasized that, "I find and conclude from all of the testimony * * * at this hearing, *confirmed* by that *previously* received, that a purpose at Darlington with respect to employees elsewhere has not been shown; and that testimony concerning related events at other mills is slight, considering quantity and credibility, and that such events can not be causally traced to a chilling purpose at Darlington." (Accent added.)

I think it appalling that the Board and the courts may step into a business and tell the directors that their judgment of the economics of their business was not correct, that it did not warrant the closing of their plant and that in reality they were evilly motivated in reference to union organization. More astounding, the Board presumes to know better than do the directors the basis for their decision—that they were simply paying servile obeisance to another.

I would not enforce the Board's order.

BOREMAN, Circuit Judge, authorizes me to state that he joins in this dissent.

CIRCUMSTANCES ATTENDING MY APPEARANCE BEFORE THE SUPREME COURT

It seems not altogether amiss to make some comments at this time on the circumstances attending my appearance before the Supreme Court in the *Darlington* case.

I had no connection with the *Darlington* case before it reached the Supreme Court, and have not participated in it since the Supreme Court decided it.

The Labor Board had made this decision in the *Darlington* case. Even though Darlington was a separate enterprise, and even though its bleak prospect of survival as a viable economic unit had been further dimmed by the advent of a union pledged to prevent it from carrying out a program it deemed necessary to insure its survival, the National Labor Relations Act denied Darlington the right to go out of business completely and permanently, and thus to enable its stockholders to salvage their equities in its remaining assets, because Darlington's decision to do so at the particular time it acted had been found by the Labor Board to have been influenced to some degree by its displeasure with the union's narrow victory in the representation election.

The Circuit Court had rejected this interpretation of the National Labor Relations Act and refused to enforce the Labor Board's decision on the ground that a private employer had an absolute right "to go out of business in toto or to discontinue it in part permanently at any time" for any reason—a decision which was supported by the overwhelming weight of authority among Circuit Courts up to that time. The Supreme Court had agreed to review the ruling of the Circuit Court.

At this time, I was asked to appear before the Supreme Court in behalf of Darlington and argue one proposition, and one proposition only, namely, that any private employer has an absolute right under the National Labor Relations Act and the Constitution to go out of business completely and permanently for any reason.

I do not know who decided I should be requested to argue this proposition before the Supreme Court. Candor compels the confession that I was highly honored by the request because Darlington and Deering Milliken were already represented by some of America's ablest lawyers. I was informed, in substance, that the request was made of me because I was known to entertain the abiding conviction that the chief objective of the Constitution is to protect Americans from tyranny, regardless of whether it comes from the legislative or the executive or the judicial branches of government.

I thereupon agreed to appear before the Supreme Court and argue that any private employer has an absolute right to go out of business completely and permanently for any reason satisfactory to himself. I did so because I know that this right must be recognized and respected if our country is to remain the land of the free.

To be sure, I received compensation for my services as an attorney, which was duly reported for income taxation to the appropriate officials of the United States and North Carolina. Inasmuch, however, as the principle I advocated before the Court is essential to the continued existence of my country as a free society, I would have embraced an opportunity to champion it before the Court without compensation—a course I followed in *Flast* v. *Cohen*, 392 U.S. 83, where I had the privilege of joining a great lawyer, Leo Pfeffer, in defending the right of Americans to be free from Federal taxation for the support of religious institutions.

It is absurd to suggest, as Mr. Meany did during his appearance before the Judiciary Committee, that in supporting the President's nomination of Judge Haynsworth for the post of Supreme Court Justice, I am merely "arguing for my clients."

The truth is I have no clients nowadays. My obligations as an attorney in the *Darlington* case have been fully performed. Moreover, I am under no obligation to any person on earth which impairs one iota my capacity and my purpose to perform my duties as a United States Senator in accordance with my own honest judgment. At the risk of appearing immodest, I will confess my belief that the people of North Carolina have returned me to the Senate by overwhelming majorities on four occasions because they know that I carry my own sovereignty under my own hat.

I do not know what persons connected with Darlington and Deering Milliken think of Judge Haynsworth. But if they adopt a test similar to that expressed, in essence, by witnesses for the AFL–CIO before this Committee, i.e., that no judge ought to be promoted to the Supreme Court if he has ever decided any case in a manner displeasing to them, the persons connected with Darlington and Deering Milliken must be opposed to Judge Haynsworth, who on two occasions joined the majority of the Fourth Circuit Judges in decisions in the *Darlington* case adverse to them.

WHY I SUPPORT THE NOMINATION

I did not know Judge Haynsworth personally until these hearings began. I base my purpose to support his nomination solely upon his decisions and opinions as a Judge of the United States Court of Appeals for the Circuit in which I reside. These decisions and opinions have engendered in my mind an abiding faith that Judge Haynsworth will perform the duties of a Supreme Court Justice with what Edmund Burke called "the cold neutrality of the impartial judge." America must have Supreme Court Justices who will do this if her people are to enjoy equal justice under law.

The CHAIRMAN. Samuel W. Tucker.

Mr. Tucker, take a seat. Please identify yourself for the record. I understand that you have a prepared statement. You may deliver it or you may summarize it, whichever you prefer.

TESTIMONY OF SAMUEL W. TUCKER, ATTORNEY, RICHMOND, VA.

Mr. TUCKER. Thank you, Mr. Chairman.

My name is Samuel W. Tucker, and I am a partner in the law firm of Hill, Tucker & Marsh, in Richmond, Va. I have practiced law in Virginia since 1934. For several years I have served as chairman of the legal staff of the Virginia State Conference of NAACP branches. I also am a member of the National Legal Committee and of the National Board of Directors of the National Association for the Advancement of Colored People.

I appear here as a witness on behalf of the National Association for the Advancement of Colored People.

To explain the opposition of the National Association for the Advancement of Colored People to the proposed elevation of the Honorable Clement F. Haynsworth, Jr., to the Supreme Court, we need merely to mention the efforts of our association which led to the 1954

and 1955 decisions of the Supreme Court in the school segregation cases and the continuing interest of the association in the full implementation of those decisions and their progeny. Judge Haynsworth chose not to understand or simply refused to accept the Supreme Court's basic holding, although it was stated unequivocally in these very plain words:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place.

The ink was hardly dry on the 1955 implementing decision when the late John F. Parker, then the chief judge of the fourth circuit and sitting as a member of the three-judge court on remand of the case styled *Briggs* v. *Elliott*, pronounced a flat contradiction of the Supreme Court's holding which for all practical purposes became the supreme law of the fourth circuit, and indeed was accepted as law by all public officials who sought the continued maintenance of separate public schools, whether equal in physical facilities or not. This doctrine of polite rebellion, but rebellion nevertheless, subsequently adopted and tenaciously held by Judge Haynsworth, was proclaimed in these words:

> It [the Supreme Court] has not decided that the States must mix persons of different races in the schools. * * * If the schools which it (the State) maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. * * * The Constitution in other words does not require integration. It merely forbids discrimination. (132 F. Supp. at 777.)

That was a plain fact contradiction of what the Supreme Court had held the year before.

The case of *Dillard* v. *The School Board of Charlottesville*, 308 F. 2d 920 (4th Cir. 1962), tested the validity of the *Briggs* v. *Elliott* dictum and revealed a sharp division of the fourth circuit bench. The case was first argued before a panel consisting of Senior Judge Soper, Chief Judge Sobeloff, and Circuit Judge Boreman, and after an opinion had been prepared by Judge Soper but before it was announced by the court a hearing en banc was ordered before the five active judges of the court.

The case involved a modified geographical plan for assignment of children to public elementary schools. It may be described by picturing a wheel with five spokes; the hub of the wheel representing that part of the city wherein most of the Negro citizens live, and the spokes representing the boundaries of the attendance areas for the five white elementary schools. At issue was the consitutional validity of a rule which permitted any child to transfer from a school wherein he would be in a racial minority.

Judges Sobeloff, Boreman, and J. Spencer Bell adopted the opinion which had been prepared by Judge Soper. They recognized that the obvious purpose and effect of the rule was to minimize race mixing in the elementary schools. The 149 whites living within the hub attended the white schools located between the spokes. The blacks living within the hub were required to attend the all-Negro school located in their neighborhood. The few nonwhite children who lived outside the predominantly black neighborhood could be and were "encouraged" to join others of their race at the all-Negro school. Thus, after 6 years

of litigation of the Charlottesville school case, the *Brown* decision had proved to mean no more than that 20 Negro children were attending one elementary school with white children and 16 were attending the city's high school.

By vote of three to two, the fourth circuit struck down the plan as a clear evasion of the school board's duty under the Constitution.

Joining in a dissent written by Judge Bryan, Judge Haynsworth opposed the thesis of the majority that the law requires integration. Although the majority opinion did not state such thesis, we can understand how the dissenting judges extended the implications of the decision and correctly assessed the underlying thesis. We cannot understand, however, how they found inconsistency between that thesis and the Supreme Court's prior holding that in the field of public education the doctrine of "separate but equal" has no place.

Judge Haysworth's separate dissent, a little bit more intellectually honest, with which Judge Bryan concurred, can be read as a concession of the validity of the thesis of the majority where, notwithstanding 6 years of active litigation in the Charlottesville school case, he maintained that the court has no right to strike down Charlottesville's plan during what he called a period of transition.

The Supreme Court upheld the decision both by its denial of certiorari and by its decision in *Goss* v. *Board of Education of Knoxville, Tennessee*, 373 U.S. 683 (1963). That issue should have been settled, but nevertheless, Judge Haynsworth held tenaciously to his view which, at best, was that a school board needed only to refrain from too efficiently thwarting efforts of individual Negroes to obtain admission at white schools.

We cannot overlook Judge Haynsworth's 1963 contribution to the tragedy of Prince Edward County, Va. In *Griffin* v. *Board of Supervisors of Prince Edward County*, 322 F. 2d 332 (4th Cir. 1963), he voted for further delay in overturning that in which he saw no wrong; that is, the closing of all public schools in Prince Edward County to avoid compliance with the Supreme Court's rejection of Prince Edward's contention that "separate but equal" schools met the requirements of the Constitution. His opinion approaches that callous disregard for the miseries of the less fortunate which is far from representative of the American people and their political institutions. We shall read a most disturbing paragraph from his opinion:

> The impact of abandonment of a system of public schools falls more heavily upon the poor than upon the rich. Even with the assistance of tuition grants, private education of children requires expenditure of some money and effort by their parents. One may suggest repetition of the often repeated statement of Anatole France, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." That the poor are more likely to steal bread than the rich or the banker more likely to embezzle than the poor man, who is not entrusted with the safekeeping of the moneys of others, does not mean that the laws proscribing thefts and embezzlements are in conflict with the equal protection provision of the Fourteenth Amendment. Similarly, when there is a total cessation of operation of an independent school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in the locality.

Here Judge Haynsworth is saying to the Negro children of Prince Edward County that their case, which the Supreme Court decided in 1954 and 1955 was an exercise in futility because, in the final analysis,

public education is something gratuitiously extended which may be withdrawn for any reason or for no reason. He is saying that Negro children, being generally poor, should have gratefully accepted public education on terms prescribed by their county even if those terms required foregoing what the Supreme Court treated as fundamental rights of equal citizenship.

The democratic ideals of our country—our basic creed of liberty and justice for all—were subordinated to the notion that the command of the Constitution forbidding racial segregation in all things public can be disregarded by the strong and the powerful if and when they are so disposed. His argument that the Federal courts were powerless to vindicate the Constitution as long as certain questions of State law remained unsettled was entirely specious in the light of his disclaimer of Federal remedial power under the 14th amendment. The Supreme Court of Appeals of Virginia, over the dissenting vote of its chief justice, found itself equally helpless under its interpretation of both the State and Federal law. Had this type of thinking prevailed with the Supreme Court of the United States, the tragedy of Prince Edward County would have been repeated many times over and across this Nation, and the American scene might now be marred by revolution born of despair.

In *Bradley* v. *School Board of the City of Richmond*, 345 F. 2d 312 (4th Cir. 1965), a three to two decision, opinion by Judge Haynsworth, rejected the plaintiffs' contention that freedom of choice was not an appropriate means for the desegregation of the public schools of Richmond, Va. The opinion took note of the argument that the Supreme Court in the *Brown* cases had said, "All provisions of Federal, State and local law must yield", and then it studiously ignored the stark facts that segregation is discrimination and that the maintance of segregated schools for children to attend or to avoid was forbidden by the Supreme Court holding that in the field of public education the doctrine of separate but equal has no place.

Turning back to the plaintiffs' efforts to require the school board to desegregate faculties and thereby do something in recognition of its duty under Brown, Judge Haynsworth, for the majority, suggested:

"When all direct discrimination in the assignment of pupils has been eliminated, assignment of teachers may be expected to follow the racial patterns established in the schools."

His underlying thinking thus revealed is that Negro children and their parents should be left with the full burden of effectuating the transition to nondiscriminatory school systems.

Without hearing argument, the Supreme Court reversed that part of the decision which pertained to faculty desegregation. (*Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965).)

Last year, the Supreme Court again reversed a decision by Judge Haynsworth written for the divided Fourth Circuit. We refer to *Green* v. *County School Board of New Kent County, Virginia*, 391 U.S. 430 (1963). New Kent had but two schools, one for black and one for white, each carrying grades one through 12. Negro children were given a choice as between segregation and desegregation, and white children had no choice which they or their parents deemed practical.

When the *New Kent* case was at the circuit level, the Fifth Circuit had squarely repudiated the doctrine of *Briggs* v. *Elliott*. But Judge

Haynsworth's opinion for the Fourth Circuit majority considered that, when augmented by further faculty desegregation then directed, the school board's adoption of freedom of choice would be complete fulfillment of the constitutional duty. (*Green* v. *County School Board of New Kent County*, 382 F. 2d 338 (4th Cir. 1967).) The Negro parents were left with a choice of appealing the case or transferring their children en mass to the white school, thereby forcing the school board to abandon freedom of choice and assign children of both races to each school. The holding of the Supreme Court in *New Kent* is now encouched in language so strong that a panel of the Fourth Circuit (which did not include Judge Haynsworth) was impelled to pronounce the death of the *Briggs* v. *Elliott* doctrine. (*Walker* v. *County School Board of Brunswick County, Virginia*, — F, 2d — (4th Cir. No. 13,283 (1969(.))

Senator ERVIN. That was the first decision in the Fourth Circuit, which said that Judge Parker's statement in the *Briggs* case was dead?

Mr. TUCKER. It is the first one in words, yes, but the *Charlottesville* decision established the principle. As a matter of fact, after the *Charlottesville* decision, *Briggs* v. *Elliott* was not quoted in a Fourth Circuit case again until Judge Haynsworth became the Chief Judge and wrote the opinion in *Bradley*.

Senator ERVIN. That is the first time it was said?

Mr. TUCKER. Whether it was said or not, the doctrine separate but equal——

Senator ERVIN. You do not mind answering a question?

Mr. TUCKER. Certainly not.

Senator ERVIN. That is the first time that any decision written by any judge expressly stated that the *Briggs* v. *Elliott* doctrine was dead?

Mr. TUCKER. That is right.

Senator ERVIN. That is all.

Mr. TUCKER. But what I am saying, that mere intellectual honesty would have dictated to all that *Briggs* v. *Elliott* was born dead.

As a matter of fact, when we come to think about the thing, when Judge Parker says there is nothing to prevent children from choosing their schools, that was a factual misstatement because public authorities had always told children where to attend schools. There had never been any choice as to where to go to school.

Senator ERVIN. Judge Parker was a very wisc and learned judge.

Mr. TUCKER. I certainly respected Judge Parker as a jurist, I respect his opinion, but this particular *Briggs* v. *Elliott* was something that was contradictory of what the Supreme Court had said and the factual basis of it was untrue.

Senator ERVIN. That depends on the interpretation of the *Brown* case.

As I interpret the *Brown* case, and as Judge Parker interpreted the *Brown* case, it held that a child could not be denied admission to any school on account of his race.

Mr. TUCKER. That was because Judge Parker chose to interpret that way, but the Supreme Court never said that and when it decided *Coper* v. *Arron* it said what it said and that was contradictory to the——

Senator ERVIN. Judge Parker had a very bright legal mind and I guess he is entitled to his interpretation and you are entitled to yours.

Mr. TUCKER. Anyhow, it is to be hoped that this will end the tug-of-way for the Fourth Circuit majority in which Judge Sobeloff has patiently led the fight for compliance with the law as stated by the Supreme Court, and Judge Haynsworth has championed the cause of those who would defy and seek to evade the supreme law of the land.

This we hope despite the fact that on May 31, 1968, and notwithstanding his notation of the Supreme Court's *New Kent* decision of 4 days earlier, Judge Haynsworth dissenting in *Brewer* v. *School Board, City of Norfolk*, reported 397 Fed. 2d at 37, expressed his view that the school board should not "deprive pupils and parents of freedom of choice."

Now he had read the Supreme Court's decision, but still he speaks about freedom of choice there.

Now I could accede that there are two ways to read that, were it not for the fact that majority to minority transfers had become a part of the language of opinions in school desegregation matters, so that in this dissent in the Norfolk case he was perceiving freedom of choice as a means of desegregating schools, he would be expressing in the language of granting majority to minority transfers. But he is still conceiving of freedom of choice as a means by which white children caught in predominantly Negro schools can escape the Negro school or black children who live in areas that are not served by the predominantly Negro school might retreat to the all-Negro schools.

We have viewed with grave concern the retrenchment in desegregation requirements by the Department of Health, Education, and Welfare. We have witnessed the request of the Department of Justice for deceleration of the court-ordered pace for public school desegregation in Mississippi. We are aware of the administration's disfavor of cease-and-desist power for the Equal Employment Opportunity Commission. The present indications are that if we are to continue making progress toward racial equality, our only leverage will be through privately conducted litigation.

Racial discord is gnawing at the very vitals of our society. The failure of our central government to make good its promises of full equality has contributed in no small measure to the loss of faith in our democratic institutions, which is now too plainly manifested in the actions of those who would destroy rather than build. The Nation cannot risk placing on its highest court a judge whose selection seems to be a reward for his persistent hostility to that court's pronouncement that the Constitution's promise of racial equality must be fulfilled here and now. A justice on the Nation's highest court should not say to the poor and to the disadvantaged in any State that this Union of States is powerless to protect them from oppression. A justice on the Nation's highest court should not say that the promise of liberty and equality for all has no more meaning or substance than the group in power at any given time and place is willing and ready to tolerate.

Senator ERVIN. I have just one question.

Is the position of organizations for which you speak that in outlawing segregation in public schools, segregation must be replaced by federally imposed integration, regardless of what the wishes of the parents of children, black and white, may be?

Mr. TUCKER. The Supreme Court answered that in the first *Brown* case. It said it should go without saying that the vitality of

these constitutional principles should not yield simply because of disagreement with them.

Senator ERVIN. Would you answer the question?

Mr. TUCKER. And my answer is that parents are not educating the children. The Supreme Court again in *Brown I* said that where the State has undertaken to educate children, the State must afford equal opportunity to all.

My position and I think the position of the law is that the State, having brought into existence these segregated schools and the segregated system, since they have been found to be in conflict with the Constitution, the State has the responsibility to undo segregation, to use Judge Sobeloff's term, and that responsibility is that of the State.

The fact that the Federal Government forced the States to do that, I find nothing wrong with it. Law is force, government is force. I am forced to pay taxes by my Federal Government, and I expect that the Federal Government owes an enforcement of compliance with the law of the land on the part of the States or anyone else who does not choose to accept the law of the land.

Senator ERVIN. In your answer to the question I put to you, it is "yes?"

Mr. TUCKER. My answer is "Yes."

Senator ERVIN. Yes?

Mr. TUCKER. An unequivocal "Yes."

Senator ERVIN. In other words, we must have integration even if we have to sacrifice the liberties of the people to get it?

Mr. TUCKER. Sacrifice the liberties of the people?

That is where I disagree with you, sir. I say that the liberties of the people in things public are the liberty to enjoy things public along with all others of the public. There is no liberty in segregation. There is no vested right in segregation and no one has the liberty to say that I want my child at public expense to be educated with children of his own race and not with children of other races. If he wants to do it at his own expense, that is his business, but he does not have that liberty with funds of the public.

Senator ERVIN. Do you not think that parents are more interested than anybody else on earth in the upbringing and education of their children?

Mr. TUCKER. I was early taught—I grew up in a law office and I recall very early my mentor pointing out to me that children are special wards of chancery and the courts of chancery protect children even against their parents, and where the courts have found, educators found, the law finds that the separation of Negro children from white children is detrimental to them, the law is operating the school system. The law requires that the State take charge of the thing, notwithstanding the wishes of the parents.

Senator ERVIN. In other words, the wishes of the parents and the wishes of the children must be ignored, and any means that are necessary to mix up the races in the public schools against their wills must be resorted to?

Mr. TUCKER. If the children's wishes were to be respected in public education—and it is a sorry education that they are at these levels, they are beginning to be respected—but if their wishes were respected in public education, the children would not need to go to school. You

certainly will concede that children do not know how to run school systems.

All right, then I further say that parents do not run school systems. The State runs the school systems and the State is bound by the equal protection clause of the 14th amendment.

Senator ERVIN. We need not quarrel about the technicalities. I think it is clearly revealed that your opinion is that schools must be desegregated, must be integrated if any white and black children are available for mixing, regardless of the wishes of the parents of those children.

Mr. TUCKER. I think that the greatest tragedy that has befallen this country in the last 10 or 15 years is the fact that children have grown up seeing that public officials who have taken the oath to uphold the Constitution of the United States have so blatantly laughed at the law and disregarded the law.

I think those lessons in civics have been burned indelibly upon the minds of young people, and it is a tragedy that has befallen our country.

Senator ERVIN. Mr. Tucker, the equal protection clause of the 14th amendment provides that a State shall not deny any person within its jurisdiction the equal protection of the laws. A State complies with the equal protection of the laws when it treats all people in similar circumstances alike. When the school district establishes a system and says the black children and the white children, can go to whatever school they want to and it treats them all alike, it supports the 14th amendment and not even oceans and oceans of judicial sophistry can wipe out the truth of that plain fact.

Mr. TUCKER. May I respond to that?

Senator ERVIN. Yes.

Mr. TUCKER. The Supreme Court, when it heard the first arguments in *Brown*, postponed its decisions on the merits, and addressed certain questions to the lawyers to be argued. The argument was unnecessary. They decided the case on the merits, but I want to call your attention to question 3–A. I think it was 3–A.

They asked the lawyers to address themselves to this question. If we hold, or having held, that in public education the doctrine of separate but equal has no place, does it necessarily follow that the Negro child must be immediately admitted to the school of his choice, that is freedom of choice, or may the court in the exercise of its discretion postpone that immediate constitutional right and give time for school boards to correct the situation and admit all children to schools on a nonracial basis?

Now that worried the court because if they had taken the first thing, that would have meant that any day in any school term that any child was dissatisfied with a segregated assignment, or he got mad with his teacher, he could walk out and go to another school and say, I have an immediate right to attend this school, and let me in. That would have been chaos all around.

What this freedom of choice is doing, that notion even cut back on what the Supreme Court was toying with. A freedom of choice, if you carry it to its logical conclusion, would mean that any black child any day he got angry with his teacher could leave that school and go to the school which white children attended and say, I want immediate admittance.

Senator ERVIN. A freedom of choice system that would prevent people from exercising commonsense—they could say they will make that choice at a particular time.

Mr. TUCKER. I am not going to dispute as to what is commonsense. I can only talk about what the Supreme Court decided.

Senator ERVIN. And I say that you and I interpret the *Brown* case differently.

I say it prohibits discrimination, and discrimination is denying a child the right to attend a particular school on account of his race. Parents of children have the right under the Constitution to determine how they are going to exercise their constitutional rights, and that right does not belong to the courts or to anybody else.

That is all the questions I have.

Senator HART. Mr. Tucker, if you have not changed Senator Ervin's mind on this point, do not feel that you are alone.

Mr. TUCKER. Senator, I have tried, in every case I have presented in this presentation, I have tried to change Judge Haynsworth's mind.

Senator HART. I have only this inquiry. It is rather broad, but I think perhaps you may be the very best witness to ask. You have been in practice since 1934?

Mr. TUCKER. Except for the time spent in the military service.

Senator HART. During those years you have been involved in a great number of landmark civil rights cases, and I note here a few of them—the Prince Edward County school cases, Richmond, Surry County, New Kent County, you have been involved in voting rights and jury discrimination cases.

Mr. TUCKER. That is correct, sir.

Senator HART. Your activity in this area has brought you before the fourth circuit court of appeals, you would guess, how many times?

Mr. TUCKER. About 20, I suppose. I have a list here I compiled for another purpose. I think I saw it here just a few minutes ago when I was flipping through here. At the time that this list was compiled there were two, I think we have added two more since then.

Senator HART. How many?

Mr. TUCKER. Seventeen or 18, I think is correct.

Senator HART. Over those years, and specifically on those occasions when you appeared before the fourth circuit, what is there that distinguishes Judge Haynsworth? Why is he, based on your explanation, exceptional?

What would persuade an appointing authority to reach in and say, here is the man?

Mr. TUCKER. You are asking my own view, and frankly, except for the attitude as revealed in the school desegregation cases and in the labor cases, that attitude being one of the persons in power can find a way to have their way, I would not know. This morning I was before one of our State judges in Richmond. We met in the hall and we chatted awhile. He noted the opposition of our association to the Haynsworth appointment. He volunteered that he really did not see how he had been suggested. Richmond would expect a person of national prominence, that would have been something he could have understood. I did not discuss with him my particular views so far as Judge Haynsworth's particular decisions are concerned. But frankly,

until I first heard the rumor of Judge Haynsworth's appointment, I would never have thought of Judge Haynsworth being selected for the Supreme Court Bench.

Senator HART. More specifically, among the bar who have had contact with the fourth circuit during the period Judge Haynsworth has been on that bench, do they regard him as the intellectual giant on the court?

Mr. TUCKER. No, I think not.

Senator HART. As the hardest worker?

Mr. TUCKER. I beg your pardon?

Senator HART. Or the hardest worker?

I have not practiced for quite a while, but we all have our impressions as to the way you label men on the bench.

Mr. TUCKER. Yes, I understand.

Senator HART. I have not practiced in front of a man who was nominated to a Supreme Court. There are gradations in opinions. I just wonder what your impression is of Judge Haynsworth.

Mr. TUCKER. Well, I am probably in an unfortunate position to make this assessment inasmuch as all of the cases, I think, that I have had before Judge Haynsworth have been school cases, desegregation cases, and I know his particular bent in that area so I try to make allowances for it.

But we consider opinions by Judge Sobeloff as brilliant. We consider——

Senator HART. Senator Ervin and Senator Thurmond would say that means that Judge Sobeloff and the Supreme Court seem to agree.

Mr. TUCKER. In the style of writing, the flow, the organization of them. You do not have to struggle with what is meant.

I have had the privilege of practicing before Judge Butsner both on the district court bench and on the circuit court bench, and my first two or three times before him, as a district judge ,I was very much amazed at his perception, at his grasp of things, at his understanding and cutting through to what the issue is all about.

Senator HART. Maybe I could bring the question into a narrower focus by putting it this way: None of us has really been able to define what a strict constructionist is, but it is something the President talked about last year as needed on the Supreme Court, along with a new Attorney General. I remember that. Now among the members of the fourth circuit, on these civil rights cases, school cases, where Judge Haynsworth's position has been described by you, would you say that if you were looking for a man in that circuit for nomination to the Supreme Court, whose position was one which lagged behind the movement of the Supreme Court, that then you might be struck with the presence of Judge Haynsworth?

Mr. TUCKER. I certainly would.

Senator HART. That is what you were looking to?

Mr. TUCKER. If that is what I was looking for.

Senator HART. Then he would be a logical fellow?

Mr. TUCKER. He would be logical, but by looking for a southern judge, and a Republican southern judge, whose efforts have been toward compliance with the *Brown* decision, I look at the fifth circuit, the chief judge, Judge Tuttle, Judge Wisdom, Judge Brown.

Senator HART. And if you were looking for a southern judge who did not stay completely in step with the *Brown* case, then Judge Haynsworth——

Mr. TUCKER. Judge Haynsworth would be eminently qualified.

Senator HART. Eminently?

Mr. TUCKER. Eminently qualified.

I have seen the memorandum prepared by Judge Haynsworth's law clerks, which lists a whole lot of cases which he decided in favor of the Negro petitioner or the person who was complaining, but in each of those they do not get right down to basic issues. It just involves one or two persons. This school problem involves the entire community. If the *Brown* decision had been complied with, it would have long since been over, but there is a step he is reluctant to take, and he is reluctant to take it either by not accepting *Brown* or by refusing to read it.

Senator HART. Your testimony, particularly as one who is familiar with that circuit, and sensitive to the cases in the area, is most helpful.

Mr. TUCKER. There is one thing I might suggest. I know another witness, I do not know whether he will get here, I just got here by the skin of my teeth, I was called in Richmond and drove up here. My impression was I would not be reached today, and I was called and drove up here this afternoon. But Mr. Chambers intended to mention or point out the contrast. In the Fifth Circuit recently the effort has been to speed up desegregation so far as the circuit is concerned, but in North Carolina there are two or three cases in which the District Court has followed Green, the *New Kent* case, and directed immediate desegregation this fall, and on appeal Judge Haynsworth was instrumental in granting stays, which means that the implementation will not take effect this fall. It may take effect next fall, totally opposite from the type of thing that has been going on in the Fifth Circuit.

Senator HART. And depending on what approach you wanted on the Supreme Court, you would either be directed to a Judge Haynsworth with his 1-year delay, or to the Fifth Circuit with more expeditious pursuit of a goal that is a national goal?

Mr. TUCKER. That is correct. That sums up the position of the association.

Senator HART. Thank you very much.

Mr. TUCKER. Thank you for the privilege of attending.

The CHAIRMAN. Any questions?

Who is the next witness?

Mr. HOLLOMAN. Mr. Nils Douglas of Americans for Democratic Action.

The CHAIRMAN. Identify yourself for the record.

TESTIMONY OF NILS R. DOUGLAS, ON BEHALF OF AMERICANS FOR DEMOCRATIC ACTION, ACCOMPANIED BY VERLIN NELSON, LEGISLATIVE REPRESENTATIVE, ADA

Mr. DOUGLAS. Mr. Chairman and members of the committee, my name is Nils R. Douglas. My associate with me here is Mr. Verlin Nelson, on the staff of Americans for Democratic Action.

I am 38 years old, I am an attorney, and I am a citizen of the State of Louisiana, more particularly the city of New Orleans.

I am here to represent the members and the officers of the Americans for Democratic Action national organization with chapters and members throughout the United States. As you already know, the ADA is a political education organization.

One of my purposes in being present here today is to attempt to present to this committee the black person's point of view on the proposed confirmation of Judge Clement F. Haynsworth, Jr., to the Associate Justiceship of the U.S. Supreme Court.

One of the questions that might automatically run in your mind is what qualifies me to be here to attempt to influence the deliberations of this committee.

I have not been elected to any State, city, or Federal office, as Mr. Conyers, Miss Chisbolm, and some of her colleagues. I have in my years of practice as an attorney been involved in both the political sphere and in the civil rights sphere.

One of the reasons why I am here is to attempt to give perhaps a broader perspective from one point of view and also a narrower perspective from another point of view to the factors which ought to be considered in the determination of this committee.

I am here in an attempt to respond to the *Dred Scott* decision and, by way of refreshing the memory of some persons, the key phrase, and I remember very distinctly being very disappointed the first time I read the *Dred Scott* decision to find out that the highest judicial organ of the Nation would feel free to say and to document that Negroes have no rights which the white person is bound to respect.

In my legal studies and experience I am told that this decision has been reversed by the 14th amendment.

There are another couple or three major decisions by the U.S. Supreme Court that I shall attempt to likewise dispute, none of which has been mentioned here today.

The first one is the *Slaughterhouse* case, and the second one is the *Civil Rights* case, and while these are old cases they have a very direct hearing on what we are here about today.

The *Slaughterhouse* case naturally said that persons who have requests of a court should either go to the Federal courts, depending upon which governmental unit is deemed to have insured whatever right is being sought.

In the civil rights case, obviously it is the case which created the State action doctrine, as far as I am concerned the State action doctrine is a fiction. It is an old fiction, and it is a fiction through which the equal protection and due process clauses of the U.S. Constitution have been used as a device through which the rights of Negroes have been sifted and filtered ever since 1873, 1883, on down to the present day.

I do not think anyone would dispute the fact that Negroes' rights in the main in education, in housing, in voting, and in the jury system have come to us through the edicts of the U.S. Supreme Court, principally through an interpretation of the equal protection and the due process clauses of the 14th amendment.

That is what all of the persons who oppose the confirmation of Judge Haynsworth are talking about when the talk about the *Brown* case.

Nobody has mentioned that in the pre-*Brown* cases, the business of the equal protection of law had been filtered through in at least seven or eight prior major cases in which the same question is being dealt with that we are dealing with now:

What rights are Negroes entitled to?

And by tortuous glossing over of first the facts and then the law, you come up with bits and pieces of rights being granted to us from time to time.

I think that there is a direct relationship between what the committee does here today and all of the cases that I have mentioned up to now.

I am suggesting to the committee that the constitutional history of the Negro in America has been a checkered progress, if progress it be at all.

Recently with reference to the several Civil Rights Acts that have been passed, persons who are of tender age would feel that this is the first time that we have been exposed to this, but the fact of the matter is, shortly after the Civil War there were several Civil Rights Acts which in one form or another, either by rescindment in the Federal Congress or by being shredded through judicial pronouncements, these rights have been reduced to almost nothing.

Why am I here?

I am here because I think the rate, the shape, the color, the tone and quality of life, everyday life for Negroes in America is being is being determined now and in the foreseeable future, shall be determined by the legal philosophy of the members of the U.S. Supreme Court.

By way of qualification, I should say here that my remarks are not addressed to Clement F. Haynsworth the individual or the person. I do not know him personally, and that perhaps might be my loss. I do know, however, what, as a black man, my ambitions are. I do know what the ambions of my children are. I do know what the needs and wants of the black people are in America, and for this committee to act favorahly upon the nomination of Clement F. Haynsworth, to confirm his nomination, is to confirm in the minds of any thinking Negro the notion that the 13th amendment and the 14th amendment to the Constitution do not mean what they claim to mean.

If what I say is fairly representative of a race to which I proudly belong, then perhaps at this late hour in the day what I have said may have some influence on your deliberations.

Now what does this mean with reference to Clement F. Haynsworth or to the nominee from the fourth circuit?

The point that I am attempting to make is that he has documented in much the same way that the fiction of State action has been documented, first in one form and then in another, he has documented his position with reference to some of the civil rights questions in the decisions that he has authored, in the specially concurring opinions that he has authored, and in dissent that he has authored.

There is no need for us to question what his subjective feeling is on some of these subjects, because the manifestation of his feeling is evidenced in the decisions that he has authored.

What are some of the decisions to which I have reference?

I know the Senator has been here all day and he has heard from some of the other lawyers their points of view on Griffin versus the Prince Edward County, but bear with me. I think the word was "sufferable" that was used earlier in the meetings.

The principal issue in the Griffin case was whether the plaintiffs had a judicially enforceable right to have free public schools opened in Prince Edward County. That case was offered by the nominee. The position that I take with reference to the decision here is that the court, through its decision writer, chose to ignore aspects of the case which it could not in good conscience, in good faith, reasonably ignore in the light of the *Brown* v. *the Board* case.

What am I attempting to say?

I am saying that the focus of the decision was on Prince Edward County, when in fact the rest of the State was operating free public schools. The schools in Prince Edward County had been closed down. The students who were attending the so-called private schools were being given tuition grants which were being paid for both by the county and by the State, to people who contributed to the private schools were being given tax credits.

The position of the court with reference to the operation of the school was a narrow position; namely, that they have to deal only with the Prince Edward County schools and they could ignore, as they chose to ignore, the existence of the schools in all the other counties in the State.

I say that that is a twisting of the State action principle, as was commonly known, up until that time.

The court glossed over the facts. What facts? The facts, namely, that the State had contributed to the tuition grants, the fact that the county was giving tax credits. These are facts which are undeniable and cannot be repudiated.

Now how was this done? In effect, what the fourth circuit did, and it was done as a result of the action in the district court, the district court enjoined the State and the county from giving both tuition grants and the tax credits. So then the forth circuit could conveniently ignore when the case got up to the fact that at one time tuition grants were being granted and at one time tax credits were being given.

And using another device, the doctrine of abstention, under the guise that there were some questions which were independently Federal questions and there were other questions which were mixed, both Federal and State questions, they chose to permit the State courts to act on the question of whether or not the State had assumed the responsibility for running the public schools in the State. This decision was later overruled.

Now here I shall quote the exact words from Judge Haynsworth as included in the decision, in which he admits what I have been attempting to say:

> The allowance of such tax credits appears to be an indirect method of handing public funds to the foundation. They are very unlike Virginia's program of tuition grants to pupils which has a lengthy history. The allowance of such tax credits makes uncertain the completeness of the county's withdrawal from the school business. It might lead to a conclusion that exclusion of Negroes by schools of the foundation is county action. Their allowance, however, during the second of the four years that the foundation has operated its schools, does not require a present finding on this record that the county is still in the school business and that the acts of the foundation are its acts.

This is a glossing over of the facts. This is a glossing over of the law. This is an impermissible background, this is an impermissible quality for a person who is seeking to be appointed to the Bench of the U.S. Supreme Court.

The Nation, the citizens throughout the United States ought not to be required to engage in the presumption that a man who has written a decision such as the decision in *Griffin* v. *Prince Edward County* is going to give the full measure of justice in civil rights cases.

Not only is there that admission in the case, if I am permitted to quote again, another admission of the quizzicalness of the holding of the court is as follows, and I quote again:

> For no one questions the principle that if Virginia is operating a statewide centralized system of schools, she may not close her schools in Prince Edward County in the face of a desegregation order while she continues to operate in other counties and cities of the Commonwealth.

I do not think anything more need be said with reference to *Griffin*.

Another case, and the point of it is that these cases are representative of the attitude of Judge Haynsworth with reference to the civil rights question. In *Simpkins* v. *Moses H. Cone Memorial Hospital*, the question was whether two initially private hospitals were so impressed with the public interest as to make them an instrumentality of the Government within the reach of the fifth and 14th amendments.

The court held that yes, the fifth and the 14th amendments to the U.S. Constitution did prevent the hospitals from segregating against Negroes.

In the dissent by the nominee, this is what he said:

> These hospitals are not publicly-owned. They serve no public purpose except that their operation contributes to public health just as it did before they received the Hill-Burton funds. The state has an interest in public health, but identity of interest does not convert a private organixation into a public body.

This was after the *Burton* case, and I submit to you that this is again a glossing over of the facts. In his specious reasoning—and one who aspires to the highest bench in the Nation cannot or should not be permitted to occupy the bench in the light of decisions of such a nature.

Without belaboring the subject, in *Eaton* v. *Grubbs*, in which the same fundamental question was posed, namely whether or not the hospital was engaged in activities which were covered by the 14th amendment, in which the facts are much clearer than the facts in the *Simkins* case, still the nominee in a concurring opinion said that he believes the views that he expressed in the *Simkins* case are still correct.

In *Dillard* v. *The School Board of Charlottesville*, a 1962 case, the issue was the validity of the permissive minority transfers, and there has been much discussion to date about whether or not when one removes the shackles in one area we should be apprehensive of creating shackles in another area, but I think that to pose the question in such a way is to do exactly the same thing which Judge Haynsworth has done in the cases that have been discussed here to date. No one has focused on the fact that what the Negro plaintiffs were complaining of in the permissive transfer cases was not that two Negroes out of 100 students in a school could transfer to an all-Negro school. The Negroes were not complaining that two whites in a school with a

population of 100 Negroes could transfer to a predominantly white school. The Negroes were complaining that if, for example, there were 100 Negroes in the Jefferson School and no whites, they constituted a majority, they belonged to the majority race in that school, and they wanted to transfer, they were not permitted to transfer, and this is not freedom of choice.

This freedom of choice or permissive transfer has the appearance of equality, but it is not equality. If the court honestly and in good faith seeks to implement the equal protection clause of the 14th amendment, an adequate consideration ought to be given to those aspects of the case.

I might point out that in *Dillar* v. *School Board of the City of Charlottesville*, where the transfer plan was held invalid, and where Judge Haynsworth dissented, he in his dissent, which was a rather unique one—it was not to the point at all, in fact it was beside the point, and a close scrutiny of the dissenting opinion seems to suggest that he was advocating he was acting as an advocate—I think it is a fair reading of his dissent to say that he was advocating positions and making suggestions through his discussion to guide the school board in its prospective activities.

Now may I quote from his dissent? And again the dissent is the source, the dissent is the root, the dissent is my authority for saying that we have objective manifestations of this man's attitudinal inadequacies with reference to civil rights questions.

> One may thus concede the reasonableness of the abstract principle declared by a majority, and reasonably hold the view that the majority should have proceeded further to consider whether the planning, with its determined defects and shortcomings, might not be permissible as a temporary expedient.

I read that statement to say yes, majority, it is reasonable for you to say that the school plan is invalid. Yes, it has defects. But out of the goodness of your heart, not out of the dictates of the equal protection clause, you ought to permit this plan to go into effect, because it is a temporary expedient.

I am saying that the inconvenience to the persons who are of the anti-integration point of view was given the prominence. I say that the only conclusion that can be reached from this quote and from similar quotes which are representative of his point of view is that Judge Haynsworth is an obstructionist, his attitude is retrogressive, back beyond Brown, as far back as the civil rights cases when the State action principle was first enunciated.

Not only is he in my humble opinion vulnerable to the criticism that I have made, but the following quote adds insult to injury:

> This kind of problem exists whatever the race of the minority group, that present provision for permissive minority transfers is in the interests of Negro minorities is suggested by the extent to which they avail themselves of it.

And further on in his opinion he says:

> Mind you that the plan has been kicked out and the school board does not have any plan now with which to deal with those students who, for one reason or another, either need or want a transfer, and he suggests that even though the plan had been held invalid, that there ought to be exceptions to the rule in the absence of blanket provisions for the transfer of unwilling minorities:

Bowman v. *County School Board* of Charles City County, Va., a 1967 case, is a little different on facts. The significance of it lies in

the facts. Here is a situation where there were two schools, one white school and one Negro school. The residential pattern in this community was not segregated. The people lived wherever thay chose to live. As late as 1967 there had been no appreciable amount of integration in the school system. It was held in that case that the permissive minority transfers as an annual choice was constitutional, and what Judge Haynsworth said there was that:

> On the record we are unable to say that what impact or what the administrative difficulties in the elimination of discrimination in employment of teachers and administrative personnel.

One of the questions being involved there being whether or not the school board had properly attempted to integrate the faculty.

In the opinion of Judge Sobeloff, in his concurring opinion in that matter, he suggests that it would have been a very easy proposition for the school board in that instance to have divided the school system up into two groups and assigned the students on the basis of a geographical allotment.

In conclusion, as the Americans for Democratic Action said in a letter to all the Senators, the Supreme Court of the United States is one of the most crucial institutions in our Nation, both for what it has the power to do and for its symbolic meaning to millions of Americans. In no area is this more evident thau in relation to the equal rights of our citizens.

The Supreme Court has not only brought about historic steps toward equality during the present era, but has also been the one reason why many otherwise disillusioned Americans still trust in and respect the American system.

The nomination of Judge Clement F. Haynsworth poses a grave threat to the court's effectiveness as guardian of citizens' equality. It is now over 15 years since the court handed down its mandate in *Brown* v. *Board of Education*, yet Judge Haynsworth's record reveals that whenever he had the opportunity to cast a deciding vote on the pace of desegregation, he cast it for moving more slowly or not at all. What some would call moderation is really a record of sophisticated foot-dragging.

One can only conclude, therefore, that the nomination seriously clouds the court's future. Perhaps even more important now that "law and order" is a household phrase, placing a man with this kind of record on our Nation's highest court will be profoundly disruptive of one of the real sources of social order—confidence that the judicial process will produce justice.

What I have said here today represents in my judgment tbe viewpoint of the millions of black Americans. It also represents the unanimous viewpoint of the ADA officers and national executive committee members present at our most recent meeting, September 9, 1969.

Our national director, Mr. Leon Shull, tells me that based on his discussions with ADA members throughout the country, he believes that there rarely has been such unanimity in ADA as there is in opposing the confirmation of Judge Haynsworth.

It is respectfully submitted that this committee should not act favorably on the confirmation of Judge Clement F. Haynsworth, Jr.

Senator HART. I want to thank you.

Call the next witness.

Mr. HOLLOMAN. Mr. Willie G. Lipscomb.

Senator HART. Mr. Chairman, if I may, I would welcome the opportunity to introduce to you and to the committee a Michigan citizen. I hope that I can do this in good grace and in an unpartisan fashion.

We happen to share the same point of view on the subject that brings us together tonight, and I am delighted to welcome the Republican District Chairman of the 13th Congressional District of Detroit, Mich.

Mr. Lipscomb, I know it is late, and I understand that you have an obligation to get to Philadelphia in the morning and that you would come back, but I think the best way to insure that your point of view gets into this record is to hear you right now.

TESTIMONY OF WILLIE G. LIPSCOMB, JR., REPUBLICAN DISTRICT CHAIRMAN OF THE 13TH CONGRESSIONAL DISTRICT OF DETROIT, MICH.

Mr. LIPSCOMB. Thank you, Senator.

Mr. Chairman, members of the committee, my name is Willie G. Lipscomb, Jr. I am the Republican District Chairman of the 13th Congressional District of Detroit.

I have come here today not as an individual representing thousands of constituents, because I do not. But I come as a single citizen of the United States of America.

I feel compelled to come before you and question Judge Clement F. Haynsworth's right to be nominated to the U.S. Supreme Court. To serve as a judge on the highest court of the United States of America is a right and privilege. But it is a right that must be earned. I do not feel that Judge Haynsworth has earned this right and privilege.

We are at a point in American history in which a tremendous number of Americans feel alienated from the governing forces of America. Students are questioning the moral conscience of the United States. Blacks are questioning the sincerity of the United States in the proposition that all men are created equal. Intellectuals are questioning America's basic acts and they are terming them irresponsible.

In other words, a substantial number of Americans feel that the philosophies and ideals of America follow one course, and our actions follow other seemingly unrelated courses.

In saying this, Mr. Chairman, what I am saying in brief is that the United States is following one course in its philosophies, yet in its actions it is taking a different step.

In the nomination of Judge Haynsworth to the Supreme Court, I think the past few days and the past few weeks indeed have shown us that his integrity, in my estimation, has been clouded.

Now, what we are doing is, we are submitting the name of a judge to the highest court in the land. This judge should be above and beyond the question of his integrity. It is on this basis that I oppose the nomination of Judge Haynsworth to the U.S. Supreme Court. Our philosophies and ideals dictate that the integrity of a Supreme Court Court Judge be beyond question, and that this judge should be dedicated to the good of all Americans, regardless of race.

Based on Judge Haynsworth's past record, I contend that he has failed miserably in both instances.

In the first instance, Judge Haynsworth cast a shadow on his integrity by failing to divest himself of holdings in the Carolina Vend-A-Matic Co. Judge Haynsworth further clouded his integrity by failing to disqualify himself in a case in which a company was involved, Deering, Milliken Co., with which Carolina Vend-A-Matic held a contract worth $50,000 annually.

Judge Haynsworth subsequently ruled in favor of Deering, Milliken Co. It may be argued that there was no conflict of interest, but there is and there has been a question of conflict of interest. Again I reemphasize the fact that we are nominating a man to the highest court in the land. This man should have conducted himself to put him above and beyond any shadow on his integrity.

Senator Hart, in questioning another witness, I believe you asked the question to the effect, do you think this man has been outstanding in his field, and I think this is a key question. I think this is the crux of the situation. We are not just nominating anyone. We are looking for the man that is most outstanding in his field to sit on the highest court in this land. Again I say this is not the case.

I would just like to read to you some of the cases that Judge Haynsworth has sat on. I am sure all of you have heard these cases a number of times, but my testimony was prepared well in advance, so I do not want to delete it.

Senator HART. Feel free to go ahead.

Mr. LIPSCOMB. I am not going to argue the legalities. I am not an attorney and I would not like to get involved in that.

Darlington Manufacturing Co. v. *NLRB*, November 15, 1963. It seems to me that it is inconceivable to claim that a conflict of interest was not involved in this case. Yet Judge Haynsworth contends that his actions were proper.

Canon 26 of the code of judicial ethics, promulgated in 1908 by the Committee on Professional Ethics of the American Bar Association, says:

> A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court, and after his accession to the bench he should not retain such investments previously made longer than a period sufficient to enable him to dispose of them without serious loss.

Judge Haynsworth failed to divest himself of his interest in Carolina Vend-A-Matic until April 8, 1964, and, therefore, obviously violated the Canon of Ethics for a number of years. Based on Judge Haynsworth's impropriety as Fourth Circuit Appeal Judge, I feel that Judge Haynsworth should not be confirmed.

The second area of poor performance which I would like to cite in my argument against confirmation of Judge Haynsworth is the area of civil rights. Judge Haynsworth obviously is not dedicated to the good of all Americans, regardless of race.

Before we get into this, it can be argued and I know that this is true, there are many other cases where Judge Haynsworth did rule in a different manner, but again we are not arguing that point. I think the point is that these cases do give us some insight into his philosophy.

I would like to emphasize for those that may argue that Judge Haynsworth's decisions were issued in keeping with the feelings of his constituents and that as a judge on the Supreme Court he would have a different constituency and, therefore, rule differently, that a judge should not be elevated to the Supreme Court in hopes that his record will be better in the future but because he had had an outstanding record in the past.

Judge Haynsworth certainly has not had an outstanding record in the past. His decisions in many of his cases could not have been dictated by moral conscience, and a strong conviction for what is right. Unfortunately, a number of Judge Haynsworth's decisions could have been dictated only by extreme racism.

Judge Haynsworth's segregationist point of view is quite obvious in the five following cases. In all five of these cases, Judge Haynsworth was subsequently reversed.

1. In 1963 a lawsuit was brought by black parents to require that the public schools in Prince Edward County, Va., be reopened. They had been closed since 1959 by local authorities to prevent desegregation. Judge Haynsworth ruled in favor of the school board in a 2-to-2 decision.

A year later, the Supreme Court reversed the decision. This case was widely considered an important test of Virginia's policy of resistance to the 1954 Supreme Court school desegregation decision. (*Griffin* v. *School Board*, 1964.)

2. In the early 1960's some local school boards allowed any child who was in a racial minority in his neighborhood to transfer out of his neighborhood school and move to a school where his race was in a majority. The Fourth Circuit outlawed this practice, but Judge Haynsworth filed a dissent. The Supreme Court later prohibited this same device in a Tennessee community as an evasion operating to preserve segregation. (*Dillard* v. *School Board of City of Charlottesville, Virginia*, 1963.)

3. In 1965 the Supreme Court held that, Federal courts must consider the issue of racial segregation among the faculties in public schools as a part of desegregation suits brought by black students. This reversed two decisions by Judge Haynsworth in which his opinion prevailed by a vote of 3 to 2. (*Bradley* v. *School Board*, 1965; *Gilliam* v. *School Board*, 1965.)

4. More recently, in 1967, he held that freedom of choice plans were legal and valid proposals for desegregation, regardless of whether or not they actually produced desegregation. This interpretation was overturned unanimously by the Supreme Court in 1968. (*Green* v. *County School Board of New Kent County, Va.*, 1968.)

5. A case was brought by a group of black patients, dentists, and physicians who had sought and been denied admission to an all-white hospital constructed with Federal funds under an act which included a "separate but equal" clause. The fourth circuit held that this section was unconstitutional and that a facility receiving substantial Federal funds could not discriminate racially, with Judge Haynsworth dissenting. The majority ruling previewed the principle embodied in title VI of the 1964 Civil Rights Act. (*Simkins* v. *Moses H. Cone Memorial Hospital*, 1964.)

Based on Judge Haynsworth's past record, I feel that Judge Haynsworth is not of sufficient moral fiber to sit as a judge on the U. S. Supreme Court, and would indeed be a discredit. I further beseech this committee to refuse to consent to the appointment of Judge Clement F. Haynsworth, Jr., to be Associate Justice of the Supreme Court of the United States of America.

As I said, I do not represent a large constituency, but I come here as a citizen and, strangely enough, as a Republican, but as a Republican I feel it is incumbent on me to question any of the administration's policies that I do not feel are correct.

I feel that each one of us is embodied with a duty, whatever our party ties are, but again as a Republican I feel even more of an obligation to question this appointment to the Supreme Court.

I do not think this appointment would be in the interests of all Americans of the United States.

Senator HART. Mr. Lipscomb, that very fine statement of yours should earn the respect of everybody within reach of your voice and of those who read it.

You bet it is not easy to move in the direction clearly different from a step that your party takes, which is a major step.

Here is the Haynsworth appointment, a national issue. The President goes to South Carolina for the judge. A controversy develops. No one would have asked why you did not leave Detroit and come down here to testify if you had not. The fact that you did is all to your credit.

I am sorry that you were not here a little earlier today. You would have heard both Congressman Diggs and Congressman Conyers voice the same concern that you have voiced.

But again, especially with the political facts involved, it adds a greater persuasion to your position.

I think that what you are telling us is that you believe that this appointment would be likely seriously to impede the movement for for racial equality in this country. That is really why you come in and say do not confirm.

Mr. LIPSCOMB. Absolutely.

Senator HART. We can solve Vietnam, if we ever do, and yet if we do not solve that domestic problem we will be noted in history as a failure.

The Supreme Court is going to be with us for a long time, given life expectancy tables.

I again thank you for your willingness to come forward and speak your conviction.

Mr. LIPSCOMB. Thank you, Senator Hart, Mr. Chairman.

Senator HART. The Senator from Mississippi, our Chairman Mr. Eastland, indicated before we concluded that we would at this point recess until 10 a.m.

(Whereupon, at 6:15 p.m., the committee recessed, to reconvene at 10 a.m., Friday, September 26, 1969.)

NOMINATION OF CLEMENT F. HAYNSWORTH, JR.

FRIDAY, SEPTEMBER 26, 1969

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to recess, at 10 a.m., in room 2228, New Senate Office Building, Senator Sam J. Ervin, Jr., presiding.

Present: Senators Eastland (chairman), Ervin, Dodd, Hart, Kennedy, Hruska, Thurmond, Cook, and Mathias.

Also present: John H. Holloman, chief counsel, Peter M. Stockett, and Francis C. Rosenberger.

Senator ERVIN. The committee will come to order.

I understand the first witness is Mr. Randolph Phillips. How long a statement do you have?

TESTIMONY OF RANDOLPH PHILLIPS, CHAIRMAN, COMMITTEE FOR A FAIR, HONEST, AND IMPARTIAL JUDICIARY

Mr. PHILLIPS. I have already filed it with the committee. It is about 16 or 17 pages.

Senator ERVIN. You may proceed.

Mr. PHILLIPS. The Committee for a Fair, Honest and Impartial Judiciary has been organized to give the laymen a voice in the selection of the Federal and State judiciaries, to raise the deplorably low standard of judicial ethics illustrated by recent cases that have been prominently called to public attention, and to emphasize the fact that a clean and incorruptible judiciary has not been obtained for the citizens of the United States either by the professional bar associations or the Congress or the appointive powers. Just as the patient is interested in a skilled and incorruptible physician, we the people of the United States are interested for the safety of our lives and property and of the national public interest in a skilled and incorruptible judiciary.

The members of this committee for a fair, honest and impartial judiciary include Robert L. Bobrick, a member of the bar of the Supreme Court of the United States for some 30-odd years; Dwight MacDonald and Susan Sontag, both distiguished writers of national reputation, Robert Brunstein, dean, Yale Drama School, Dr. Charles Fisher, a leading psychiatrist and psycholanalyst and winner of the Menninger Foundation gold medal for distinguished services in his field, Dr. Robert J. Lifton, of Yale, and Daniel Bell, professor of sociology, Columbia University, and an outstanding authority in his field. My biography is in Who's Who. I respectfully refer the committee to it. May I say that I am formerly the Chairman of the Finance

34-561—69——35

and Law Committee of the Board of Directors, and I am presently acting as coordinator, of the Lawyers Committee of American Policy Towards Vietnam. We agree with you, Senator Ervin, that the war in Vietnam has been unconsitutionally carried on. I have twice argued in the Supreme Court of the United States, and once there as an amicus curiae. I can't say I had too much success. I started off losing 8 to nothing, the next time 5 to 3, and the last time 4 to 3, so I can't say that I am speaking as an advocate of the Warren court.

All us, laymen and lawyers, have a direct and substantial interest in the fairness, honesty and impartiality of the highest judicial tribunal in the Nation and in the method by which its members are appointed and confirmed. It is because the basic principles of open and honest selection and fair play based solely on distinction and merit are being violated that we oppose this appointment.

But the nomination of Judge Haynsworth should not be rejected by this Committee on the Judiciary. It should not be withdrawn by President Nixon. It should be withdrawn by Judge Haynsworth himself. The true test of the ethical sensitivity of any man, judge, politician or layman, is the degree of embarrassment to which he will subject his friends and supporters in the pursuit of his personal ambition. Judge Haynsworth said to this committee he did not want a vote of confidence by 100 judges or 100 bishops, but only the judgment of the Senate of the United States.

I submit there is a prior judgment that must be made and it is a wrong judgment for a man of ethical sensitivity to ask from the Senate in the face of the accumulated record in this case. The true judgment, the essential judgment is that which, face to face with the God he believes in and his own image in the mirror every morning-Judge Haynsworth pronounces on himself by persisting in or withdrawing on his own motion his own nomination, a judgment he makes by embarrassing or relieving the embarrassment of his Republican and Democratic friends on this Committee on the Judiciary, men of stature, fair mindedness and high ethical sensitivity. For certainly Judge Haynsworth must know by now that he has embarrassed his high sponsors from President Nixon down by his admissions of cupidity and stupidity. Cupidity in the Carolina Vend-A-Matic transactions and stupidity in the Brunswick stock purchase. Are cupidity and stupidity now to be added as qualifications for confirmation to the Supreme Court of the United States? Has not that august body been battered enough by its enemies not be battered further by a fellow judge?

Mr. Justice Fortas voluutarily withdrew from the Court rather than further embarrass his fellow judges. Will Judge Haynsworth now demonstrate an equal or a lower sense of obligation to his senatorial friends and his fellow judges? That is the $64 question whose answer the Nation is awaiting. If Judge Haynsworth insists upon the Senate voting him up or down, he is insisting on the embarrassment of his friends in the Senate and his future colleagues on the Supreme Court. He will go on the Supreme Court with indelible marks of cupidity and stupidity that will further lower the reputation of the Court. And this it seems to me is the essential point: Will his confirmation elevate respect for the Supreme Court or lower it? Will it raise or lower public belief in a high judicial standard of ethics?

I am really appealing to the Republican conscience. And in that matter, I ask the Republican members not to lower the standards of previous Republican appointments to the Supreme Court. For instance, here is what President Theodore Roosevelt wrote:

. . . I should like to know that Judge Holmes was in entire sympathy with our views, that is, with your views and mine . . .

he is writing to Senator Henry Cabot Lodge, Mr. Chairman—

before I would feel justified in appointing him . . . I should hold myself guilty of an irreparable wrong to the Nation if I should put . . . [upon the Court] any man who was not absolutely sane and sound on the great national policies for which we stand in public life.

Nothing has been so strongly borne in on me concerning lawyers on the bench as that the nominal policies of the man has nothing to do with his actions on the bench.

Senator ERVIN. Roosevelt said in that statement that he was appointing Holmes because he thought his views coincided with his?

Mr. PHILLIPS. Yes. You have an excellent memory, Judge Ervin, Senator Ervin.

Senator ERVIN. And Judge Holmes rather disappointed Roosevelt, didn't he?

Mr. PHILLIPS. Isn't that true of some other Republican appointees?

Senator ERVIN. As a Democrat, you know that I am not in favor of any Republican appointees. This is in jest of course.

Mr. PHILLIPS. Senator Ervin, I do regard you as a judge, I know you are a former judge. I have the highest respect for you and the work you are doing on the Subcommittee on the Separation of Powers. As you know, I attended and I have read with great interest your views, and I respect them. I trust you will respect my right to dissent in the present matter. I know you will.

Senator COOK. I do dissent on his last remark, by the way.

Senator ERVIN. Well, I would make an exception. I would vote for your confirmation, for Chief Justice.

Mr. PHILLIPS. Senator Cook, may I direct this, then, to you, since our good friend here has disavowed any Republican endorsements?

Senator ERVIN. I would say my remarks was entirely facetious, as the Senator, of course, knows.

Mr. PHILLIPS. I appreciate that, Mr. Chairman. Now, Senator Cook, then, may I read Theodore Roosevelt's remarks to you as well as to the Chairman:

Nothing has been so strongly borne in on me concerning lawyers on the bench as that the nominal politics of the man has nothing to do with his actions on the bench. His real politics are all-important. In lurton's case, Taft and Day, his two former associates, are very desirous of having him on. He is right on the Negro question; he is right on the power of the federal government: he is right on the Insular business; he is right about corporations, he is right about labor. On every question that would come before the bench, he has so far shown himself to be in much closer touch with the policies in which you and I believe that even White because he has been right about corporations where White has been wrong.

I am quoting from an article in the Midwest Journal of Political Science for February 1959 entitled "The Justices of the Supreme Court: A Collective Portrait" by John R. Schmidhauser. He states:

To be sure, presidents have occasionally paid off political debts (as many have been the case in the appointment of Justice Carron), or perhaps have 'kicked upstairs' bothersome cabinet officers (as has been alleged in the selection of

Justice McLean), but the so-called crasser political motives have not generally been determinative in the appointment of members of the Supreme Court.

Let us turn now to the "crasser political motives."

We oppose the confirmation of Clement F. Haynsworth, Jr. as Associate Justice of the Supreme Court of the United States on the grounds (a) that his nomination by the President of the United States was not based on the selection of the jurist or lawyer most qualified by achievement for that position but on political considerations related to the procurement of the nomination of the incumbent President of the United States by the Republican Party through a pledge to Senator Strom Thurmond and his political associates as shown by the appended news story dated August 18, 1969, in the Chicago Tribune of August 19, 1969; (b) that as a judge of the U.S. Court of Appeals for the Fourth Circuit, Judge Haynsworth failed to disclose the facts already set forth in the record about Carolina Vend-A-Matic, prior to hearing argument in and joining in the 3-to-2 decision that decided in favor of the company in the *Deering Milliken* case.

May I say parenthetically that I think the ethical breach here is not what he did afterward, but what he failed to do before he sat in that case. Anybody who has been in court very often, and before judges whom one has reason to suspect might be unconsciously biased or prejudiced is entitled to know the facts about that judge and any judge of high incorruptibility will always disclose the facts, prior to hearing the case, so the counsel may make a judgment as to whether he wants to make a motion to disqualify.

Counsel here were deprived of that, and it is for that reason that I associate myself, as chairman of the Committee for a Fair Impartial Judiciary, with the position that has been staffed in the record by the opponents of Judge Haynsworth on this question of Carolina Vend-A-Matic.

And finally (c), it is apparent that the nomination of Judge Haynsworth is motivated by considerations about winning the 1970 congressional and the 1972 presidential elections. How else is one to interpret the facts stated in Newsweek's issue of September 8, 1969, in its article on Atty. Gen. John Mitchell "The Law-and-Order Man"?

I will read just a few quotes, if I may.

Mitchell who backed stolid but uninspiring judges like Warren Burger and Clement Haynsworth for the U.S. Supreme Court.

Yet Mitchell is also the co-author and the chief executor of the so-called "Southern strategy," which sees the Old Confederacy as central to a victory coalition that could keep the White House Republican for a generation.

Not unpalatable to you, Senator Cook, I am sure. But, and this is what I draw to your attention, Mr. Chairman:

And ensconced in an office near Mitchell's own is intellectual *Wunderkind* Kevin Phillips, 29, whose book, "The Emerging Republican Majority," has become the political bible of the Nixon era. In it, Phillips suggests that the GOP can win without the liberal Northeast and the Negro vote by putting together an alliance built around California, the heartland Midwest and West—and, of course, the rising Republican South. Mitchell disowns authorship of that formula—or at least the "Southern strategy" part of it. But Phillips' book is dedicated to the "two principal architects" of the new coalition: Richard Nixon—and John Mitchell.

. . . that role has fallen largely to South Carolinian Harry Dent, Strom Thurmond's former hand who is now based at 1600 Pennsylvania Avenue.

Mitchell, speaking about his role:

His role, as he described it, was "programming" the candidate. He discharged it with a kind of authoritarian, all-business austerity that nettled some staffers—"chairman of the board" was the nicest thing they called him—but in the end he programmed Richard Nixon to the Presidency.

Mr. Chairman, this is the first time in the history of the Republic that Supreme Court seats have been made into poker chips to buy the nomination of a candidate for President of the United States. A favorable vote on the nomination of Judge Haynsworth will also be, if it is obtained, the first time the Senate of the United States will have given its constitutional "advice and consent" to the proffer of a seat on the Supreme Court of the United States as legal tender to help purchase the 1970 congressional elections and the 1972 presidential election.

What is the evidence for these statements? It did not originate with the committee for a fair, honest, and impartial judiciary. But it comes directly and indirectly from the President of the United States and from Harry Dent, who is described by Aldo Veckman of the Chicago Tribune Press Service, as "Nixon's chief political adviser." Mr. Dent is a former administrative assistant to Senator Strom Thurmond, and all the Senate knows that both Judge Haynsworth and Senator Thurmond are from the State of South Carolina. But only the readers of the Chicago Tribune Press Service know of Aldo Beckman's disclosures of August 18, 1969. Here is what he said in pertinent part:

In a classic political masquerade, Senator Strom Thurmond [Republican, South Carolina] outfoxed his political enemies to get the Supreme Court appointment for Clement F. Haynsworth, Jr.

Dent confirmed the story today, several hours after the western White House in California announced Haynsworth's appointment.

I am skipping.

. . . it was more significant for what it didn't say than for what it did say.

For the truth of the matter was that Thurmond actually was promoting Haynsworth, and his endorsement of Russell was a Machiavellian arrangement aimed at drawing the opposition away from Haynsworth and directing it toward Russell, who never was a serious contender for the spot.

The veteran South Carolina lawmaker, who was so instrumental in obtaining the GOP nomination, and in delivering the South for Nixon last fall, had come to the conclusion that his endorsement of any candidate for the Supreme Court would be a "kiss of death."

He knew it would be politically unthinkable for the Nixon administration, already under fire from liberals for rejecting a liberal physician for the Nation's top health post and for relaxing school desegregation guidelines, to even consider appointing a man to the Supreme Court who had been endorsed by Thurmond, considered by many to be the epitome of southern segregationists.

Dent, a former administration assistant to Thurmond, conceived the idea of the phony endorsement.

Although Dent realized the pitfalls of his scheme, especially if it was disclosed before the nomination, he smiled with relief one morning several days after Thurmond had released the Russell statement.

As Dent remarked today, "They fell for it, hook, line, and sinker."

So that's what the Senate of the United States is asked to participate in and bless: "a classic political masquerade," "a fascinating maneuver" in which "Nixon's chief political adviser set up a decoy," "a Machiavellian arrangement," a "phony endorsement" by "the veteran South Caolina lawmaker who was so instrumental in obtaining the GOP nomination, and in delivering the South for Nixon last fall."

To continue the quotation: "As Dent remarked today: 'They fell for it, hook, line, and sinker.' "

Perhaps some of the 16 members of the Senate Judiciary Committee approve these tactics. But do a majority? That majority, including both the Democratic and Republican members of this committee are honorable men, as was President Theodore Roosevelt, men of conscience, men who put the good name and prestige of the Republic and of its highest institution of justice, above the sordid level of "masquerade," "maneuver," "phony endorsement" and "decoy." It is unmistakably clear, thanks to the boasting of Harry Dent, where the truth lies: A vote for Haynsworth is a vote for Strom Thurmond and his "Machiavellian arrangement."

It is not Harry Dent who alone crows to the press about how smart he is but it is also the President of the United States who has helped us come close to the core truth about the reasons for this nomination. Here is what Richard M. Nixon, as a private citizen ambitious for high office, told that distinguished journalist-historian, Theodore H. White, on or about May 28, 1968, respecting his campaign for nomination by the Republican Party as its candidate for President of the United States.

And then I quote from Mr. White's book, "The Making of the President—1968", chapter 5, pages 137–139, at length. I won't read the entire excerpt. I provide the committee with it. Mr. White notes he saw:

> There, in a corner, was a familiar face, the Republican victor of the evening. Richard Nixon and his wife—

Then he quotes Mr. Nixon:

> I'm going on to Atlanta, Teddy, I'm going to wrap up the whole campaign there.

Then he continues:

> At Atlanta, Mr. Nixon went on to meet with the Southern leaders—Senator Strom Thurmond of South Carolina, Senator John Tower of Texas, and other considerable individuals of the Republican Party of the South.
>
> * * * * * * *
>
> On civil rights, which was the chief concern of the Southern Republicans, Mr. Nixon agreed that the Supreme Court phase "all deliberate speed" needed re-interpretation; he agreed also that a factor in his thinking about new Supreme Court Justices was that liberal-interpretationists had tipped the balance too far against the strict-construction interpreters of the Constitution; and he averred, also, that the compulsory bussing of school students from one district to another for the purpose of racial balance was wrong. On schools, however, he insisted that no Federal funds would be given to a school district which practiced clear segregation; but, on the other hand, he agreed that no Federal funds should be withheld from school districts as a penalty for tardiness in response to a bureaucratic decision in Washington which ordained the precise proportions of white or black children by a Federal directive that could not be questioned in the provinces.
>
> More specifically, as he "wrapped up" the campaign on June 1st, Mr. Nixon noted that Strom Thurmond seemed most interested in national-defense policy; and he gave reassurance to Senator Thurmond that he, too, believed in strong defense. The Southerners, in general, wanted to be "in" on decisions, not to be treated like pariahs on the national scene as Negroes had previously been treated. On this, too, Nixon gave reassurance. No particular veto on Vice President or Cabinet members was requested—

Significantly no mention here of Supreme Court justices—

although Mr. Nixon assured them they would be in on consultations. To their desire that he campaign heavily throughout the South, Nixon could not give entire assurance—Deep South states like Mississippi and Alabama he felt were lost, but he would stump the Border South. The Southerners wanted some clearance on Federal patronage; they agreed that a new administration ought, indeed, to include large personalities from the South; and some would have to be Democrats, since the Democrats are still the Establishment of the South. But the Southerners wanted no appointments that would nip the growth of the Southern Republican Party; they did not insist on veto, only on consultation.

All in all, Mr. Nixon could please and reassure the Southern chairmen; and when he left, his nomination was secure. There would later be the threat of Nelson Rockefeller; but the Rockefeller threat was one jaw of a trap which could be effective only if the other jaw, Ronald Reagan, could operate. With the understanding at Atlanta, the Reagan move was blunted and the convention could safely be turned over to Richard Kleindienst, who now had a clear field for his talents.

* * * * * * *

The Atlanta conference had locked up the South and Border States under Strom Thurmond's harsh discipline for another 394 votes.

In short, putting together the admissions—or should we say the confessions—of Harry Dent and Richard M. Nixon, what is the unmistakable conclusion? Strom Thurmond was promised on June 1, 1968, at Atlanta, that in return for his 394 votes at the August 1969 Republican Convention he could name as Associate Justice of the Supreme Court of the United States a sitting Federal judge. To deny this is to deny how extraordinary it is that Mr. Nixon from over 417 sitting judges on the Federal district and appellate courts, not to mention the more than 100,000 attorneys in good standing who are members of the Bar of the Supreme Court of the United States, should name a nationally obscure South Carolina Federal judge who just by sheer coincidence, by extraordinary concatenation of circumstances, happens to sit in Strom Thurmond's home State.

But let not this Committee on the Judiciary measure the propriety of this appointment by my words or Mr. Dent's and Mr. Nixon's admissions. This is what the Honorable Morris Ames Soper, for many years the chief justice of the very U.S. Court of Appeals for the Fourth Circuit upon which Judge Haynsworth sits as chief judge, said:

Our professors, however, had one unshakeable belief: a faith that is as essential today as it was when the first judgment was pronounced . . . It is the simple and solemn thought that the administration of justice should be undefiled and that the dispenser of justice should be chosen for his character and his wisdom and not for the extent of his political influence. The corollary of this faith is that any executive who shirks this ideal shall be condemned.

Judge Soper was a Republican.

Senator ERVIN. Judge Soper was a very fine judge, wasn't he?

Mr. PHILLIPS. I certainly agree. He awarded me a fee of $5,000 once, which I considered minimal.

Senator ERVIN. And yet we have the charge made here in these hearings that two opinions written by him showed anti-union bias on the part of Judge Haynsworth.

Mr. PHILLIPS. Certainly you don't want me to comment on that, Mr. Chairman.

Senator ERVIN. I don't care.

Mr. PHILLIPS. I understand your point of view, however. I admire Judge Soper. I disagree with him vitally in a very important case in Baltimore, but he was a Republican. He was chief judge of the very

circuit from which Judge Haynsworth comes, and of which he is now chief judge, and I say to you that I think Judge Soper spoke for all parties, Republican, Democrat and all others, who seek to serve the best in the national spirit and not the worst.

The appointment of Judge Haynsworth should "be condemned" and rejected by the honorable members of this committee. And perhaps the most authoritative word on this subject should come from the American Bar Association itself. As the first sentence of Canon No. 2 of the Canons of Professional Ethics states:

> 2. The Selection of Judges
> It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges . . .

I charge the President of the United States as a lawyer, as a member of the bar, with violating that canonic standard. He did not pick, and there is no proof in this record that he picked, this particular nominee based on judicial fitness as outweighing political considerations. The proof that I put in the record this morning I submit, and I submit it respectfully to Senator Cook, Senator Hruska, Mr. Chairman, shows the contrary, and that proof should be rebutted if it is not true.

The burden of proof is therefore now on the administration: on the President of the United States, on the Attorney General of the United States, and on their "chief political adviser," Mr. Harry Dent and his former employer, the Honorable Strom Thurmond now to come forward and testify that "political considerations" did not "outweigh judicial fitness in the selection" of Clement F. Haynsworth, Jr., as Associate Justice of the Supreme Court of the United States. Let the truth be told by Messrs. Nixon, Mitchell, and Thurmond, lawyers all, and let them testify in the open that they have lived up to high canon of their own professional articles of faith, not to mention their oath "faithfully" to discharge their offices under the Constitution of the United States. Certainly this Committee on the Judiciary will also want to hear from Messrs. Theodore H. White and Aldo Beckman so as to satisfy itself that the forthcoming decisions of the Supreme Court of the United States on the most momentous issues of life and death now facing the Nation are not to be put on the auction block by candidates for the highest office in the land. The Senate of the United States repudiated the court-packing plan of Franklin Delano Roosevelt as repugnant to constitutional standards.

May I say parenthetically, Mr. Chairman, I was consultant to the Senate committee at that time, headed by Senator Burton K. Wheeler, the architect of the opposition to the court-packing plan. I lived through that period.

The very reputation of the Senate and the Court for integrity of legislative and judicial decision, for equal justice under law, now depend upon a similiar repudiation of the court-packing plan of Richard Milhaus Nixon.

Finally, in considering the appointment of Judge Haynsworth, let us put the facts in the context of Senator Strom Thurmond's own standards:

Senator Strom Thurmond stated on September 16, 1969, "at the presentation of Judge Haynsworth before the Committee on the Judiciary of the Senate," and I quote:

Mr. Chairman, I have known Judge Clement Haynsworth, Jr. for many years * * * As a practicing attorney, he tried cases before me while I was a Circuit Judge in South Carolina * * * his treatment of the various issues of law, presented before him (as a member of the Federal Judiciary) have been balanced. Let us be reminded at this point that the scales of justice are balanced, and are not artificially weighed in the favor of either the right or the left but are balanced and even. So we find Judge Haynsworth's decisions and his judicial philosophy to be balanced and even.

Upon the basis of my personal knowledge of him as a man, a lawyer, and as a member of the Federal Judiciary, I can, and I do, recommend him for this appointment.

The records of this committee show that in 1957 the late Senator Olin Johnson of South Carolina and then Democratic Senator (now Republican Senator) Strom Thurmond sponsored Mr. Haynsworth's appointment by President Eisenhower as Judge of the U.S. Court of Appeals for the Fourth Circuit. The records of this committee also now show that on November 15, 1963, Judge Haynsworth "balanced" the scales of justice by casting the deciding vote in favor of Deering Milliken. The records of this committee do not reflect to date one important fact which I will now supply to the committee, since the record shows that Deering Milliken from 1957 to date has been controlled by a man named Roger Milliken. The missing fact is that Roger Milliken is "the wealthy South Carolina textile magnate, the State Republican finance chairman, and Thurmond's backer."

I give the authority for that as follows——

Senator ERVIN. That is a rather queer inference, because Judge Haynsworth wrote two opinions against the interests; Deering Milliken interests.

Mr. PHILLIPS. Under the mandate of the Supreme Court of the United States. He did not voluntarily, not as a court of review in the first instance, Senator Ervin.

Senator ERVIN. Oh, yes, he did. You should reread the first *Darlington* case.

Mr. PHILLIPS. And, furthermore, in the second case, I was rather shocked to read, and the one that you have been referring to at length here in these hearings, I was rather shocked to read that Judge Haynsworth, in his concurrence, which was not concurred on this point by two other members of the court sitting with him, tried to guide the future decision of the National Labor Relations Board into a field of evidence that was not before him for decision, namely he tried to prejudge and tried to coerce the National Labor Relations Board by suggesting that the Board should exclude evidence on the question of payment to these men. May I say that Roger Milliken sounds to me like a man out of Dickens. Five-hundred employees put out of work.

Senator ERVIN. Mr. Phillips, that is just exactly the opposite of what his opinion held.

Mr. PHILLIPS. I disagree with you, sir. His opinion under the mandate of the Supreme Court was forced to find that the Board's final order should be enforced, the final order at that stage of the game, but his opinion went beyond the mandate and volunteered a view of the evidence that was not properly before him. He tried to coerce the Labor Board. That was the impropriety in my judgment, and I submit if you submit this to 100 lawyers at random, they will agree with me.

I don't expect to get your approval of my views, Senator Ervin. I trust your trust. I trust you will respect mine.

Let me complete my statement.

The State Republican finance chairman was Thurmond's backer.

So we see how "the scales of justice" have been "balanced." Democratic Senator Strom Thurmond sponsors attorney Haynsworth first for a seat on the fourth circuit. Judge Haynsworth votes for Roger Milliken, Senator Thurmond's backer, and the Republican Party which Roger Milliken controls in South Carolina along with now-Republican Senator Strom Thurmond appoints Judge Haynsworth as Associate Justice of the Supreme Court of the United States through the instrumentality of Richard M. Nixon, who prior thereto obtains his nomination by making an agreement with Senator Strom Thurmond on June 1, 1968, under which 394 votes controlled by the Senator and his associates at the Republican National Convention, are given to candidate Nixon, thereby obtaining his nomination as President of the United States.

Vice President Hubert Humphrey said that the appointment of Mr. Haynsworth, in the words of the Washington Post, imply that President Nixon's appointment of Haynsworth was a payoff, asking rhetorically "Whom did you expect the President would nominate," and I would like to tender this for the record, if I may, the Washington Post issue of September 24, 1969.

(The article referred to follows:)

[From the Washington Post, Sept. 24, 1969]

HUMPHREY CRITICIZES HAYNSWORTH'S RECORD

ST. PAUL.—Former Vice President Hubert H. Humphrey today made a slashing attack on Judge Clement F. Haynsworth Jr., calling his record "anti-labor, conservative and 'slowdown on desegregation.'"

"I don't like it," Humphrey told an enthusiastic Minnesota Federation of Labor convention.

Humphrey, who was urged by the convention to run for the Senate next year, implied that President Nixon's appointment of Haynsworth was a payoff, asking rhetorically, "Whom did you expect the President would nominate?"

"After all, he had broad support in South Carolina," Humphrey said of the President.

Humphrey recalled that his own ticket didn't carry a Southern state during the election last year and he said that was because of his position on race, desegregation, labor, and welfare.

"We are going to get on the court exactly what you elected," he said, presumably using "you" to mean the plurality in the presidential election.

Noting that AFL–CIO president George Meany had testified against Haynsworth's confirmation, Humphrey said he had warned organized labor and "millions of Americans" during the campaign that the next President would appoint three to five new members of the Supreme Court.

Mr. PHILLIPS. What we thus have is not a single payoff not a double payoff, not a triple payoff, but a quadruple payoff. Roger Milliken, Strom Thurmond, Clement Haynsworth, Jr., and Richard M. Nixon all win. They win in one of the dirtiest and most sordid political games that has ever been played with judgeships as pawns and poker chips in the history of the Republic. Roger Milliken wins his case with Judge Haynsworth's deciding vote; Strom Thurmond wins his campaign to nominate an Associate Justice of the Supreme Court of tbe United States; Judge Haynsworth wins his seat on the High Court and Richard M. Nixon wins the Presidency of the United States.

The only losers are Nelson Rockefeller, Ronald Reagan, the Textile Workers of America, the National Labor Relations Board, and we the people of the United States of America for whose protection with equal justice under law the Constitution was promulgated.

At no time in what he described as his "presentation" statement of Judge Haynsworth to this committee did Senator Thurmond disclose his relationship to Roger Milliken, the beneficiary of Judge Haynsworth's deciding vote in the 1963 *Deering Milliken* case, and yet Senator Thurmond knew for weeks at least that the propriety of that vote would be a crucial issue before this committee.

"Silence when there is a duty to speak may ke a fraud," stated Judge Henry J. Friendly in the *Texas Gulf Sulphur* case. The fact that Roger Milliken is Strom Thurmond's "backer" and the fact that Strom Thurmond is Judge Haynsworth's "backer" before this committee and the fact that Judge Haynsworth was the "backer" of Roger Milliken's case in the U.S. court of appeals are facts that may not be overlooked by any "backer" of fair, honest, and impartial justice in the courts of the United States.

These are facts that the American people are entitled to know. I therefore respectfully request this committee to call as a witness Roger Milliken. Without his testimony as to his relationship with Senator Thurmond, the "backer" of Judge Haynsworth, there will be before this committee only an incomplete record on the "conflict of interest" charges that have preoccupied it for days.

Now perhaps there is an innocent explanation of these facts. Perhaps I have misunderstood them. Perhaps the reputable printed sources upon which I have relied are mistaken. Is it not the duty of this committee to determine their truth by calling Roger Milliken as a witness? Is it not the duty of Senator Strom Thurmond to his fellow Senators to come forward and make full disclosure of his relationships from 1957 to date with Roger Milliken? For it is Roger Milliken who is the beneficiary of Judge Haynsworth's 1963 deciding vote. Does Senator Thurmond have any connection past or present with the Deering Milliken group of companies?

These are, we submit, questions whose answers the American people are entitled to know and which this committee and the Senate as a whole are entitled to know.

In conclusion, I have raised three basic questions:

(1) Is the nomination of Judge Haynsworth the completion of a deal made at Atlanta on June 1, 1968, in which Mr. Nixon presold his prospective office of President by offering Strom Thurmond a Supreme Court seat for 394 convention votes?

(2) Is the nomination a part of Attorney General Mitchell's southern "strategy" for winning the 1970 congressional elections and the 1972 presidential election? and

(3) Did the losing parties in the 1963 *Deering Milliken* case enter a judicial gambling hall where the game was played with a stacked deck of cards?

The Senate can determine the answers to these questions by calling as witnesses Theodore H. White, Aldo Beckman, the writers of the book and news stories I have mentioned, as well as Attorney General Mitchell and Roger Milliken. At that point the American people may

determine whether we have entered an era of justice under a new administration or slipped back into the morals of the administration of Ulysses S. Grant.

I have nothing more to say. There are three Republican members on this diocese and I appeal to their conscience by the standards of Republicans. There is not a single judicial nomination to the Supreme Court of the United States, insofar as I can see by reading the history of the Supreme Court, Senators Hruska, Cook, and Mathias, that has ever been determined by such low principles as the present nomination seems to be.

You as Republicans are the custodians on this committee——

Senator MATHIAS. If the witness will suspend, Mr. Chairman, how long do you think it will take to conclude?

Mr. PHILLIPS. Two or three minutes.

Senator ERVIN. Mr. Phillips, your statement has been most intriguing to me about the Machiavellian operations of Republicans, but I do not believe the question before this committee is whether Strom Thurmond is as smart as you say he is.

Mr. PHILLIPS. Not I. I didn't say it.

Senator ERVIN. Therefore I have no questions.

Mr. PHILLIPS. I did not say it. Harry Dent said it. Mr. Richard Nixon said it. I did not say it. I am not testifying. I am giving evidence. I am offering to prove, I offer to prove that this nomination was bought with votes at the Republican Convention, bought in an improper way, bought in a way that is offensive under State statutes, criminal statutes, possibly offensive under the criminal conspiracy statutes of the United States, an untested question. I offer to prove this. Offer to prove this through Roger Milliken, through Harry Dent, through the Attorney Geueral of the United States, through Aldo Beckman, through reputable witnesses, through Theodore White.

I offer and I submit that this Senate committee will be blinking its duties to the American people if it does not take the proof.

Senator ERVIN. We have heard all the evidence.

Mr. PHILLIPS. You have not heard the witnesses. I have made an offer of proof.

Senator ERVIN. We have other witnesses waiting a long time to be heard and we have given you a fair opportunity to be heard.

Mr. PHILLIPS. And I thank you for it.

Senator ERVIN. You have presented your views very forcefully and very eloquently. I have no questions.

Senator HRUSKA. I have no questions.

Mr. PHILLIPS. Thank you very much.

Senator ERVIN. I want to clarify something at this point. There has been a great deal about the question of the seven decisions which are cited here to show Judge Haynsworth has an antiunion bias. I have discussed four of these cases, one of which never reached the Supreme Court, that is *NLRB* v. *Logan Packing Company* 386 Fed. 2d 562). But the three did reach the Supreme Court on the same question, that is the rules governing the use of cards, authorization cards rather than secret elections to determine whether unions represent the majority of the employees in a particular union, in *National Labor Relations Board* v. *Heck's, Inc.* (398 Fed. 2d 337), *National Labor*

Relations Board v. *Gissel Packing Company* (398 Fed. 2d 336), and *National Labor Relations Board* v. *General Steel* (398 Fed. 2d 339). Only one of these opinions was written by Judge Haynsworth, and nobody appealed from that opinion at that time, because he applied the law as it then existed.

Now, when these last three cases reached the Supreme Court together with a case from another circuit, they were reversed and remanded to the National Labor Relations Board because on the day of the oral argument the National Labor Relations Board through its counsel announced that their rules had been changed at that moment. Chief Justice Warren who wrote the opinion of the Supreme Court in the cases, *National Labor Relations Board* v. *Gissel Packing Company* (395 U.S. 575), said this at page 613:

> Despite, however, reversal of the fourth circuit below on No. 573 and 691—
>
> These per curiam decisions—
>
> on all major issues, the actual area of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter.

When the said disagreement between the fourth circuit and the Supreme Court of the United States is not large it passes my powers of comprehension that that shows any union bias.

There are three other cases on this point. One is the *National Labor Relations Board* v. *the United Rubber Workers* which was originally decided in 269 Fed. 2d. 694, and was carried to the Supreme Court. The opinion in that case was written by Judge Sobeloff, and concurred in by Judge Haynsworth, and if that shows that Judge Haynsworth is guilty of antiunion bias it also shows that Judge Sobeloff who wrote the opinion is also guilty of antiunion bias.

I put an analysis of that case in the record.

(The analysis referred to appears in the Appendix.)

Senator ERVIN. Another one making the sixth cases here to show antiunion bias is *U.S. Steel Workers of America*. I put an analysis of that case in the record at this point and point out that the opinion was written by Judge Soper, and concurred in by Judge Haynsworth and Judge Sobeloff, so if that case shows antiunion bias on the part of Judge Haynsworth it also shows it on the part of Judge Soper, and Judge Sobeloff.

(The analysis referred to appears in the Appendix.)

The seventh and last case cited on this point is *National Labor Relations Board* v. *Washington Aluminum Company* which was originally reported in 251 Fed. 2d 869, and the opinion of the Supreme Court was reported in 370 U.S. at page 9.

The opinion of the circuit court was written by Judge Boreman. The case did not involve a union at all. It involved the discharge of seven nonunion members, and how any man can have such a gift of imagination as to think that a case involving discharge of nonunion men shows any union bias is something I also have to confess I am mentally incapable of comprehending.

Senator ERVIN. The next witness is Mr. Floyd B. McKissick. He is speaking for the National Conference of Black Lawyers.

Is there any representative here of that group?

Let the record show Mr. Floyd B. McKissick was called and offered an opportunity to testify and he failed to appear.

The next witness is Victor Rabinowitz, president of the National Lawyers Guild.

Is Mr. Victor Rabinowitz present?

Senator ERVIN. Let the record show that Mr. Rabinowitz was called and given an opportunity to testify and he failed to appear.

The next witness is Mr. Matthew Guinan, international president of the Transport Workers Union.

Senator ERVIN. Let the record show that Mr. Matthew Guinan, international president of the Transportation Workers Union, was called and given an opportunity to appear and testify and he failed to appear.

The next witness is Gary Orfield, assistant professor of politics and public affairs, Princeton University.

Will you please identify yourself for the record, Mr. Orfield.

Mr. ORFIELD. Thank you.

TESTIMONY OF GARY ORFIELD, ASSISTANT PROFESSOR OF POLITICS AND PUBLIC AFFAIRS, PRINCETON UNIVERSITY

Mr. ORFIELD. My name is Gary Orfield, I am assistant professor of politics and public affairs at Princeton University.

Senator ERVIN. You may proceed in your own way, either by reading your statement or orally.

Mr. ORFIELD. Senator Ervin and members of this committee, I asked the opportunity to testify before the committee because my own research over the past several years in southern school segregation policy has made me feel deeply concerned about the impact of the appointment of Judge Haynsworth to the Supreme Court.

Because of my concern, I went back and read his decisions over the last 6 or 7 years, and tried to determine what his outlook was on the critical problems of school desegregation in the South during this decisive period. I was very deeply concerned and disturbed by what I saw.

One of the most remarkable things about this year, to a student of school desegregation, is the ease with which actions unthinkable a year ago become commonplace. Each week seems to bring a further retreat by the executive branch in civil rights enforcement.

The Justice Department, so long in the forefront of the battle to enforce constitutional guarantees, has succeeded in postponing desegregation in Mississippi schools. The House has passed, with administration support, an amendment that would destroy what remains of HEW's school desegregation program. Now the newspapers report that few Senators are worried about putting on the Supreme Court a backward-looking judge from a circuit court with a very poor record in protecting civil rights.

After 15 years of effort, we are very near a decision about the future of southern race relations. Some obvious forms of discrimination have been very largely eliminated from southern life. A great deal can be done to remedy others, such as school and voting discrimination, through firm executive and judicial action.

Obviously, the courts and especially the Supreme Court will have a great deal of influence in determining the national choice between

equal rights and an increasingly segregated society. The role of the courts is made all the more central by the decision of the Nixon administration to rely primarily on litigation rather than administrative action in enforcing civil rights laws.

At this decisive juncture, the appointment of Judge Haynsworth would symbolize a willingness to see our highest court turn away from the cause of equal rights. The appointment would deepen the worries of an already demoralized black community and rather embolden the forces of reaction, which once gain sense the possibility that desegregation may be delayed or defeated. Approval of the Haynsworth nomination would be one more sign that Congress lacks the will to face the Kerner Commission's grim warning that we may soon be "two societies, black and white, separate and unequal."

Commentary in the press has given the impression that Judge Haynsworth is a moderate on civil rights, tinged with a touch of conservatism. When I read his school desegregation decisions and evaluated them in terms of what I learned during my study of the southern school issue, I found that his position was actually that of a very conservative member of a very conservative court.

He has been willing to permit interminable delays by local segregationists, he has shown little understanding of the nature of discrimination, and he has demonstrated neither skill nor a sense of urgency necessary in forging remedies for proven local abuses.

This record, demonstrating a basic lack of sympathy for some of the basic developments in American constitutional law of the past 15 years, should disqualify Judge Haynsworth for appointment to the Supreme Court. Indeed, it is my belief that if it were not for this very conservative record on civil rights matters, it is very unlikely that senior members of this committee would still continue to support this nomination after the serious ethical problems that have been raised in earlier testimony.

This statement has two basic purposes. First, I will examine a number of school desegregation cases decided by Judge Haynsworth, comparing his conclusions with those of other judges on his own court and with the opinions of the Supreme Court.

Second, I will discuss the Senate's responsibility for reviewing Supreme Court nominations and the very ample historical precedents for rejecting Presidential choices on grounds far less serious than those present in this case.

Judge Haynsworth's school desegregation record is particularly important and revealing because of the great importance the Supreme Court gave to the circuit courts of appeal in supervising implementation of its 1954 decision.

Since the Supreme Court seldom intervened in school matters, the circuit courts, particularly the fifth circuit for the Deep South and the Fourth Circuit for Virginia and the Carolinas, played absolutely central roles in the development of the legal principles necessary to carry out the 1954 decision.

Unlike the fifth circuit, which often broke new legal ground in coping with the more difficult problems of Alabama, Mississippi, and Louisiana, the fourth circuit interpreted the Supreme Court mandate narrowly, even in situations where the local resistance was far less serious.

The court allowed stalling and token compliance. Several times Haynsworth cast the deciding vote against prompt desegregation.

In three very important cases the Supreme Court found it necessary to reverse school rulings authored by Judge Haynsworth. In a number of less famous cases he ruled in favor of local resisters. If allowed to stand, Judge Haynsworth's rulings would have threatened the entire desegregation process. None of the cases I will present came early in Judge Haynsworth's career on the fourth circuit bench. The earliest is in 1962 and most came after passage of the 1964 Civil Rights Act. Indeed the one most important case came after the Supreme Court decision in the *Green* case in 1968.

As desegregation finally began to gain momentum in Virginia in the early 1960's, school questions were heavily litigated in the State. I will use two school districts within 3 hours drive of this hearing room, Charlottesville and Powhatan County, to illustrate Judge Haynsworth's approval of procedural delays and local tactics of evasion.

When his court refused to approve a Charlottesville plan that would perpetuate segregation by letting the white minority but not the black majority transfer out of the school in the city's ghetto, Haynsworth dissented. He claimed that the plan local authorities put forward was nondiscriminatory and he added gratuitously in his opinion the common segregationist argument that many black students would "likely have senses of inferiority greatly intensified" by integration.

Even in this case involving a moderate university town with relatively simple problems, Haynsworth took an extremely narrow view of the local school board's responsibilities. He argued that the Constitution required nothing more than token desegregation of one of the city's six schools. *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (4th Cir. 1962), cert. denied, 374 U.S. 827 (1963).

I might point out, having recently lived in Charlottesville, the city now has totally desegregated schools, but it has followed for the last couple of years voluntary busing plans to maintain racial balance in its schools and it has dealt with its problems without incident.

Similar attitudes were evident in his 1963 ruling on the *Powhatan County* case. He cast the decisive vote postponing admission of the first three black students to the county's schools. Judge Bell of his court dissented, saying that both the facts and the law of the case were clear and there was no excuse for further delay on this first step, the first step coming some 9 years after the 1954 decision.

Later in the same case, Haynsworth dissented from his court's decision to force the local authorities to pay the legal fees of black children. The court's intention was to discourage school systems from engaging in years of unjustified courtroom maneuvers which put an overwhilming burden on those claiming their rights. "To put it plainly," the majority said of the county's dilatory tactics, "such tactics would in any other context be instantly recognized as discreditable." Judge Haynsworth failed to see what was plain to the other judges. 8 Race Rel. L. Rep, 1037 (1963).

I think that this is an important theme that I get from reading Judge Haynsworth's opinions, that it is exceedingly difficult for him to see the problem of discrimination from any perspective other than that of local white leadership, and I think not even local white Sou-

thern leadership, the local white leadership over the Southern black in the Deep South.

The following year, 1964, Judge Haynsworth was reversed by the Supreme Court in the extremely important case of Prince Edward County, Va. The county, one of the original four school systems involved in the Supreme Court's 1954 decision, had become the symbol of white resistance across the South when it shut down its public schools to avoid token desegregation. After 11 years of litigation, blacks in the county appealed to the Federal courts to force reopening of the schools. A Virginia Federal district judge responded by ruling that the county could not close its schools simply to avoid compliance with the Supreme Court decision while local taxpayers continued to pay State taxes used for public schools in the rest of the State.

Judge Haynsworth, however, cast the deciding vote on the appeals court reversing the district court judgment and returning the case for yet another round of litigation in the Virginia State courts.

In his opinion, Judge Haynsworth reached the incredible conclusion that Prince Edward County "abandoned discriminatory admission practices when they closed all schools as fully as if they had continued to operate schools, but without discrimination."

Such a doctrine would have confronted black citizens in many Southern towns with the horrible choice between "voluntarily" remaining in inferior segregated schools and having no schools at all.

I talked with the superintendent in the county adjoining Prince Edward. He told me that there was a period of several years when these matters were being litigated in the Federal courts when there was a strong movement in his county to close public schools as well, and the people who favored continuing public education had to meet secretly with drawn shades to speak to each other, in the hope that they could get enough local support to retain public schools.

Judge Haynsworth saw no greater legal barrier to closing down the schools, a public service essential to individual opportunity, than to local action giving up a rather minor Federal-aid program.

He refused to strike down a local ordinance subsidizing the private segregationists schools by allowing people to substract from the tax bills substantial contributions to the white schools. *Griffin* v. *Board of Supervisors*, 322 F. 2d 332 (4th Cir. 1963).

Judge Haynsworth has recently said that it is unfair to judge him by his past decisions. "They are condemning opinions written when none of us was writing as we are now," he commented in response to civil rights groups' criticism. The *Prince Edward County* case, however, demonstrates the inadequacy of his explanation.

This case, like a number of others, found other members of the Fourth Circuit bench far in front of Judge Haynsworth but unable to persuade him to join in their efforts to protect constitutional rights. Judge Bell, for example described his *Prince Edward* opinion as "a humble acquiescence in outrageously dilatory tactics." Local officials, Judge Bell wrote, had openly announced that they "closed the schools solely in order to frustrate the orders of the Federal courts that the schools be desegregated."

I had a graduate student at the University of Virginia 2 years ago who went down to Prince Edward County to talk to the local white

leadership there and there had been no change whatever in their interpretation of why the schools had closed. There had never been anything that had been exceedingly hard to understand. It has been openly proclaimed very shortly after the 1954 decision.

Bell saw the Haynsworth decision as an "abnegation of our plain duty." Bell wrote:

"It is tragic that since 1959 the children of Prince Edward County have gone without formal education. Here is a truly shocking example of the law's delay."

While hundreds of children were being educationally crippled by a fourth year without schools, Judge Haynsworth deferred to the local request for still another delay.

The Supreme Court rejected Judge Haynsworth's reasoning. Writing for the Court, Mr. Justice Black described what was then a 13-year delay since the filing of the initial suit. The record clearly showed, Justice Black wrote, that "Prince Edward's public schools were closed and private schools operated in their place with State and county assistance, for one reason only: to insure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school."

The aged Alabama Justice seemed able to easily grasp facts that eluded a circuit judge far less aware of the nature of discrimination and far more sympathetic to the sensibilities of local white leadership. *Griffin* v. *County School Board of Prince Edward County*, 84 S. Ct. 1226 (1964).

Two years later, in a less important case, Judge Haysnworth again ruled in favor of Prince Edward County While the constitutionality of tuition grant payments was being litigated before the Fourth Circuit, the county board ignored an assurance that no action would be taken and suddenly distributed and cashed $180,000 in aid for children attending the segregated white private schools.

The clear intent was to get the money spent before the Federal courts could issue a final order against it.

The majority on the Fourth Circuit saw this as "willful removal beyond reach of the court of the subject matter of the litigation." Haynsworth dissented, relying on a technical issue and downplaying the significance of the local defiance *Griffin* v. *County School Board of Prince Edward County*, 363 F. 2d 206 (1966).

Two more Haynsworth decisions, involving the important question of faculty desegregation, were reversed by the Supreme Court in a 1965 case In ruling on the desegregation plans of Richmond and and Hopewell, Va., Judge Haynsworth refused to require faculty desegregation, in spite of growing recognition in Southern Federal courts that this was an essential part of the desegregation process. He cast the deciding vote in the Richmond case, where the dissenters argued that "as long as there is a strict separation of the races in faculties, schools will remain 'white' and 'Negro,' making student desegregation more difficult . . ." *Bradley* v. *School Board*, 345 F. 2d 312 (4th Cir. 1965), and *Gilliam* v. *School Board*, 345 F. 2d 325 (4th Cir. 1965).

The Supreme Court rejected this reasoning, indicating its judgment that faculty integration was related to student integration. Had

Judge Haynsworth's position prevailed, the difficulties in implementing successful desegregation would have increased and it would have been easier for school boards to fire black teachers as schools were desegregated.

Once again, in 1968, the Supreme Court found it necessary to reverse an important Haynsworth school decision. When the Supreme Court handed down its historic *Green* decision against "freedom of choice," it rejected a leading device for delay repeatedly defended by Judge Haynsworth. "Freedom of choice" is the phrase used by the South to describe an approach to desegregation based on the assumption that local officials have no legal responsibility to end racially separate schools. All they have to do is offer each student a choice of which school he wants to attend once each year.

In practice, because of local pressures, the system generally permits localities to maintain separate schools indefinitely. The constitutional right to an equal education is available only to those families willing to take the risks involved in openly challenging local racial practices. In a study conducted shortly before Haynsworth's free choice decisions, the U.S. Civil Rights Commission found widespread evidence of economic, social, and even physical intimidation of black families exercising their "freedom of choice."

I should say that earlier this month the Civil Rights Commission reaffirmed that finding and stated that the free choice system has encouraged "intimidation and economic retaliation" against families who allow their children to transfer to the white schools.

Although freedom of choice had left the pervasive segregation of the two Virginia counties concerned virtually untouched, Haynsworth clung to a distinction between "desegregation" and "integration" that had been abandoned in the other circuit court.

The level of difficulty in implementing freedom of choice plans is extreme in many areas of the South. Perhaps the great bulk of those that remain still retain segregated schools There was a hearing held just over a year ago in a Virginia county not far from where Judge Haynsworth's fourth circuit sits. The parents came up and testified that their houses had been shot into, that crosses had been burned in front of their homes, that they had been fired from jobs, denied credit, and so forth.

In casting the decisive vote on two Virginia free choice cases, one of which became the basis for the subsequent Supreme Court decision, Judge Haynsworth spurned the proposal of two members of the five-judge panel that the court find out whether free choice plans actually worked and set firm deadlines for faculty desegregation.

Thus, as recently as two years ago, Haynsworth identified himself as hostile to the claims of black students on the two most important issues then under examination in the development of school desegregation law.

The facts in these two counties were particularly outrageous. Neither county had much residential segregation, but each maintained costly duplicate sets of schools and buses which traveled the same roads to separately pick up white and black students. Neither county had the minimum number of students in either the black or the white high school needed to permit efficient operation and an adequate

curriculum. Only a handful of black children had "chosen" to enroll in the white schools.

"The situation presented in the records before us," wrote two of the court's judges, "is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed." Judge Haynsworth favored procedural delays. *Bowman* v. *County School Board*, 382 F. 2d 326 (4th Cir. 1967), and *Green* v. *County School Board of New Kent County, Va.*, 382 F. 2d 338 (4th Cir. 1967).

The Supreme Court again found fault with Haynsworth's conclusions. The Court held that State and local governments, responsible for creating and perpetuating separate school systems, were now responsible for dismantling them. "In the context of the State-imposed segregated pattern of long standing, the fact that . . . the Board opened the doors of the former 'white' school to Negro children . . . merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system . . ." Local authorities were ordered by the Supreme Court to take the fastest available route to a unitary system "in which racial discrimination would be eliminated root and branch." 391 U.S. 430 (1968).

Four days after the *Green* decision Judge Haynsworth ruled in the case of *Brewer* v. *The School Board of the City of Norfolk*, even after the Supreme Court had ruled against freedom of choice except in exceptional circumstances, Judge Haynsworth stated his approval of the free choice plan.

"I think freedom of choice," he said, "is highly desirable."

It would be unfair to argue that Judge Haynsworth has been uniformly hostile to the legal rights of black children. He has participated in a number of opinions, mostly unsigned, in which his court upheld settled desegregation law or granted some of the claims of the litigants. In each of the cases that I have criticized there are procedural and technical issues that can be argued. What is striking, however, is the fact that in his few signed opinions and dissents he speaks for those wo wish wide latitude for local evasion and narrow construction of the rights of black children.

The technical issues are decided in a way that limits civil rights enforcement. Thus, while he generally favored broad discretion for district judges allowing procedural delays, he overruled a district judge forging new remedies to deal with the extreme local resistance in Prince Edward County. It is remarkable that among his few opinions in this area, three were reversed by the Supreme Court.

Judge Haynsworth's 12 years of service on the fourth circuit have produced a weak civil rights record. This record cannot be explained by local political necessity, like that which generated black criticism of the nominations of Justice Black and Judge Parker. Judge Haynsworth was not running for office, but was expressing his beliefs as a secure and independent judge with lifetime tenure on a high Federal court.

I believe, therefore, that the argument that is often made that because Justice Black's record was different from that which some predicted, because Justice Parker was not as ineffective in implementing the rights of black litigants as most expected, that therefore you can make a generalization from those cases as to Haynsworth's circumstances. I think that there was a very critical difference in the cir-

cumstances in which the statements that lead to grave doubts about their ability on a Federal judgeship were made.

A variety of new and difficult civil rights issues will continue to come before the Supreme Court. The Court's essential role is to decide new issues not yet clear in the law and to resolve disputes that have divided the lower courts. As new devices to subvert school desegregation and prevent implementation of other civil rights laws are invented, the Supreme Court will be called on for critically important decisions.

There is exceedingly little in Judge Haynsworth's record ot produce confidence in the minds of civil rights litigants. At a time when issues basic to the future of American society will come before the Court, I believe the Senate will fail in its duty if it confirms a judge who has been so tardy in protecting children asking for an elemental constitutional right.

Judge Haynsworth's nomination has generally been interpreted as a political gesture to the Deep South. The President, of course, has every right to make such a gesture. The Senate, however, has the constitutional responsibility to independently assess the nomination. Senators need not mortgage the future to redeem one of the President's campaign promises.

Some argue that the choice of Supreme Court justices, like Cabinet members, should be left almost entirely in the hands of the President. The cases, however, are very different. A President requires wide latitude in his choice of officials to control the executive branch. Cabinet members generally have short tenure and are subject to removal by the President. A Supreme Court justice commonly serves during several administrations and is subject to no such check on his decisions. Should Judge Haynsworth be confirmed, and should he serve as long, for example, as Mr. Justice Black, it is conceivable that he will be helping make great decisions for American society at the turn of the 21st century.

Senators must consider the fact that this nomination has great symbolic significance. I think it is absolutely critical to realize the battle of symbolism that has been going on in the South over the last months, since the beginning of this administration, to realize the signals that have been going out to encourage continued resistance to desegration programs.

A North Carolina school official told me in August that the rumor going through the school districts still resisting integration is that the Supreme Court is going to be changed and they will be able to continue segregating children. Republican Congressman Fletcher Thompson of suburban Atlanta has said that the "new Nixon Supreme Court" will make a "landmark" decision permitting a return to token integration under freedom of choice.

Senator MATHIAS. Mr. Chairman, may I interrupt?

Senator ERVIN. Yes, if the witness is willing.

Mr. ORFIELD. Yes.

Senator MATHIAS. I believe that Congressman Thompson also suggested tbat Secretary Finch be impeached?

Mr. ORFIELD. Yes, he did.

Senator MATHIAS. Because he was going too fast. Do you give tbe two statements equal weight?

Mr. ORFIELD. I think the former is a factual—well, I think that it is an effort to make a prediction. I do not know how seriously he really believes it but he seriously put it forth.

Senator MATHIAS. Thank you very much.

Senator ERVIN. I suggest you put the mike a little closer so we can hear all of your statements.

Mr. ORFIELD. The Haynsworth nomination is a symbol that feeds these hopes, guarantees increased resistance, and demoralizes those who have believed that racial justice could be attained through the courts.

The Senate has rejected many Supreme Court nominees on grounds far less serious than those present in this case. In the history of the Court, 21 nominees have failed to win approval. Nine were rejected by vote of the Senate, 10 through postponements which led to withdrawal of the nominations, and one, last year, through use of a filibuster preventing Senate action. Thus, the Senate has rejected more than one nominee in six. Since many nominees were noncontroversial, it is obvious that a far higher proportion of disputed nominees have failed to receive confirmation. "In general," writes Prof. Henry Abraham, "opposition to the confirmation of a Supreme Court Justice seems to reflect the existence of deep-seated concern in the Nation."

There is deep concern in the Nation today about the ability of American government to resolve the American racial crisis. The Supreme Court will surely be called upon again and again to decide issues central to racial harmony and justice. The Supreme Court, Justice Frankfurter once said, requires men who combine the qualities of a philosopher, a historian, and a prophet. This description applies more than ever today and the Senate should use this standard to measure the Haynsworth nomination.

Supreme Court Justices, Charles Warren wrote in his classic history of the Court:

> Are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present * * * .

Justice Holmes wrote in his classic book, "The Common Law".

> The very considerations which judges most rarely mention and always with a apology are the secret root from which the law draws all the juice of life. I mean, of course, consideration of what is expedient in the community concerned. Each important principle which is developed by litigation is an fact in its bottom the result of more or less definitely understood views of public policy. Most generally to be sure under our practices and traditions the unconscious result of instinctive preferences and inarticulate convictions but nonetheless traceable to views of public policy in the last analysis.

As I read Judge Haynsworth's decisions, there is a view of policy involved, it is a view that change should not go faster than the local white majority in the Deep South can absorb it, can absorb it relatively comfortably. I do not see any kind of equal sensitivity to the desperate needs of black children who have been kept out of schools now for a whole generation since the Supreme Court decision.

At this juncture in American history, the Senate cannot afford to put on the Court a man whose judgments have often tipped the scales of justice against the cause of equal rights.

I urge the Members of the Senate to reject this nomination and to reaffirm their commitement to the ideals they have enshrined in five great civil rights acts during the past 11 years.

Senator ERVIN. I will make an allusion to only one case and that is the *Prince Edward* case. The county officials absolutely closed all public schools there.

Mr. ORFIELD. Yes; they did.

Senator ERVIN. White and black alike.

Mr. ORFIELD. Yes; but they also at the same time provided tax subsidies for——

Senator ERVIN. Yes; and they provided tax subsidies for black and white alike.

Mr. ORFIELD. But in a realistic sense, Senator, there was no organization for black private schools. There was a very well developed organization with heavy official sponsorship for white private schools in that county.

Senator ERVIN. Well, can you cite a single decision in existence up to that time holding that the school district or the school board did not have the right to close down schools?

Mr. ORFIELD. I believe that this was the first circumstance in which a school district——

Senator ERVIN. Had ever arisen?

Mr. ORFIELD. Had ever closed its schools to defy implementation of a constitutional order.

Senator ERVIN. And the question which arose was whether or not the county school board had absolute authority over schools or whether the State of Virginia had absolute authority?

Mr. ORFIELD. Yes.

Senator ERVIN. And so Judge Haynsworth said that that case should be referred to the Supreme Court of Appeals of Virginia for decision, since there was no decision on that point before the Federal court should pass on it?

Mr. ORFIELD. Judge Haynsworth allowed a procedural delay to allow that kind of appeal after the litigants had earlier——

Senator ERVIN. You can call the procedure delay if you want to, but didn't Judge Haynsworth take the position that that question of whether the county of the State had control of the school system in Prince Edward County was a question of State law and that it would be the better course to let the Court of Appeals of Virginia decide the question before the Federal court made its decision?

Mr. ORFIELD. I think, that if you read that case, Senator, you would find that the attorneys for Prince Edward had earlier neglected to take an opportunity to make an appeal to the Virginia courts, and now after some 11 years of litigation, they were being offered still another opportunity.

Senator ERVIN. I ask you one question and you talk about something else.

Mr. ORFIELD. I hardly have a chance to finish a sentence.

Senator ERVIN. I ask you the question again. Didn't Judge Haynsworth take the position in the *Prince Edward County* case that since that was a question of State law that it would be wiser to let that matter be determined by the Supreme Court of Virginia before the Federal courts ruled on it?

Mr. ORFIELD. He made that ruling, Senator, but under the circumstances the other members of his court treated it as a dilatory action because the local attorneys had failed to make that appeal earlier when they had ample opportunity.

Senator ERVIN. Well, anyway that was what he said, and there has been a well-established system in the Federal courts that Federal courts would postpone deciding a case until the State courts would have the opportunity to rule on it.

Now, isn't that a well-established rule of procedure often followed in Federal courts?

Mr. ORFIELD. It is a general procedure, Senator, but it is not necessarily followed when the intent of the State action, of the appeals in State courts is to delay enforcement of constitutional rights.

Senator ERVIN. We have had these cases construed and witnessed before and I do not care to go into that. I would call attention to your statement on page 7, where you quote Judge Haynsworth as saying "They're condemning opinions written when none of us were writing as we are now."

Now, I have read all of these opinions you talk about, and have read a whole lot of them that you did not allude to, and they have convinced me that Judge Haynsworth follows the Supreme Court. In the first place the Federal judiciary system is structured as a hierarchy in which judges in the lower echelons are obligated to follow the decisions of the judges in the higher echelons, and I assert this, I have interpreted, read these cases, and I have come to the deliberate conclusion that Judge Haynsworth told the absolute truth when he said nobody is writing opinions now like they were back some years ago, and that Judge Haynsworth has followed faithfully every decision of the Supreme Court in this field that was in existence at the time he rendered an opinion. I say that notwithstanding your allusion to the *Brewer* case, because the judgement in the *Brewer* case intimated that the court should do what Congress had forbidden courts to do in that case; that is, to bus students.

Now, I hear a lot about bad race relations in the South. How are they in the North?

Mr. ORFIELD. Senator, I was teaching in a southern university up until this fall.

Senator ERVIN. You see, you do not answer the questions. You go off and talk about something else.

Mr. ORFIELD. And I am not saying that southern race relations are in bad condition.

Senator ERVIN. I will bet you insist that the students you teach answer your questions.

Mr. ORFIELD. Race relations are in grave need of improvement in the North, and I think there are going to be a number of very important constitutional questions raised about race relations in the North in the next years, and I do not see anything in Judge Haynsworth's record to indicate that he would understand these complaints.

My belief is that Judge Haynsworth is fundamentally a man behind his time, very seriously, and very much wrapped up in the rural view of a small town in the deep South.

Senator ERVIN. We have read the same books and drawn different conclusions from them. Judge Winter who sat on the court recom-

mended Judge Haynsworth for confirmation and the American Bar Association recommended him.

I think you are correct in quoting Warren as saying the same thing that Tennyson said, Ulysses said in Tennyson's poem, "I am a part of all that I have met." I think all of us are.

Now, let me ask you whether it is your opinion that we should substitute for outlawed State-imposed segregation federally imposed integration regardless of the wishes of the black and white parents and regardless of the wishes of the black and white children who are affected?

Mr. ORFIELD. I think, Senator, the Constitution demands the abolition of the system of separate schools set up by law in the South.

Senator ERVIN. With all due respect, the Constitution demands nothing of the kind because the only thing in the Constitution that is relied on in this case is the equal protection clause of the 14th amendment which says that no State shall deny to any person within its jurisdiction the equal protection of the laws. The obligation that that provision puts on the State is to treat alike all people in like circumstances, and when a school district establishes a freedom of choice system, and allows every child in the district or the parent of every child in the district, black or white, to choose the schools they will go to, it is treating everybody alike under like circumstances, and it is full compliance with the equal protection clause. Oceans of judicial activism and argument cannot wash out that plain truth.

Mr. ORFIELD. Senator, I think that if you are sensitive to the situation in the eastern part of your own State you could not——

Senator ERVIN. I am very sensitive to it. In Hyde County, N.C., the school board acting under the economic coercion of the HEW, which I could show violated three Acts of Congress in so requiring, said they would take the money away from the county if they did not close two colored schools.

Mr. ORFIELD. They did not say that, Senator.

Senator ERVIN. Yes, they did, and make all of the students go to a centralized school that had been attended by white. For a year and a half the colored parents of Hyde County had been in an uproar demanding that their children be allowed to go to these schools that had formerly been operated for them instead of compelling them to travel to the central high school.

Mr. ORFIELD. If you will give me a chance to answer, I will tell you in the first place——

Senator MATHIAS. Mr Chairman, would the Senator yield for just one moment?

Senator ERVIN. Yes.

Senator MATHIAS. And if you will excuse me for just one moment, Mr. Orfield, I have got to go to another committee. The other day when Mr. George Meany was here testifying, I asked him to produce some additional information in support of a statement that he had made, and today I have in hand a letter from Thoms E. Harris, Esq., which produces that information on behalf of Mr. Meany, and I would like to submit the covering letter and the newspaper clips for the record.

(The material referred to by Senator Mathias for inclusion in the record follows:)

AFL–CIO,
Washington, D.C., September 19, 1969.

Hon. CHARLES MCC. MATHIAS, Jr.,
Senate Committee on the Judiciary,
New Senate Office Building,
Washington, D.C.

DEAR SENATOR MATHIAS: During Mr. Meany's testimony yesterday before the Committee on the Judiciary on the nomination of Judge Haynsworth, Mr. Meany referred to newspaper stories to the effect that Judge Haynsworth had after his nomination initially refused to answer questions of reporters as to whether he owned stock in Carolina Vend-A-Matic Company at the time of the *Darlington* decision.

You requested that we supply copies of the newspaper clippings on this, and I am accordingly enclosing two clippings. The first story, which appeared in the New York Times on August 16, 1969, states:

"Judge Haynsworth said tonight that he was not vice president of the vending company at the time of the decision. Asked if he owned shares in it at the time of the decision, he declined to answer."

The second story, which appeared in the New York Times, on August 24, 1969, states:

"He had previously declined to answer questions of whether he had been a shareholder in Carolina Vend-A-Matic, whose contractual relationship with the textile company resulted in an annual gross income of $50,000.

Photostats of these two stories are enclosed.

We request that this letter, and the enclosed photostats, be included in the transcript.

Yours very truly,

THOMAS E. HARRIS,
Associate General Counsel.

[From the New York Times, Saturday Aug. 16, 1969]

HAYNSWORTH SAYS U.S. INQUIRY CLEARED HIM OF UNION CHARGES

WASHINGTON, Aug. 15.—Judge Clement F. Haynsworth, Jr. said today that the Justice Department had investigated what he termed "blatant falsehood's" accusing him of a conflict of interest in connection with a judicial decision in 1963.

He said that the investigation, made when Robert F. Kennedy was Attorney General, showed that conflict-of-interest charges lodged against him in 1963 by the Textile Workers Union were false.

An A.F.L.-C.I.O. official confirmed tonight that charges filed against him had been found to be groundless. However, the rumors about the old charges against Judge Haynsworth further complicated the speculation over his prospects for nomination to the Supreme Court.

It had been widely reported here earlier in the week that on Thursday President Nixon would nominate the 56-year-old Greenville, S.C., Federal appellate judge to the seat vacated by Abe Fortas.

When an announcement was put off and rescheduled for Monday, in the face of rising criticism by liberals and the reports of the old conflict-of-interest charge, speculation began to rise here that the expected nomination might be coming unglued.

Reached by telephone at his home in Greenville, Judge Haynsworth said tonight that the "irresponsible charge" had been thoroughly aired at the time, "and now this circulation of blatant falsehoods is something that I—well, I just don't like it."

The core of the complicated series of allegations was that Judge Haynsworth was first vice president and a shareholder in 1963 of the Carolina Vend-a-Matic Company, which had contracts to supply vending services to various plants owned by the Deering Milliken Company, a large textile manufacturer.

After the National Labor Relations Board found that the Deering concern committed an unfair labor practice in closing a plant to avoid having to bargain with the textile union, the United States Court of Appeals for the Fourth Circuit reversed the decision, 3 to 2, with judge Haynsworth voting with the majority. The union asserted that subsequently the Deering company increased its business with the Vend-a-Matic Company.

Judge Haynsworth said tonight that he was not vice president of the vending company at the time of the decision. Asked if he owned shares in it at the time of the decision, he declined to answer.

He declined to discuss further what he termed "one of the worst canards I ever heard of," other than to say that Judge Simon E. Sobeloff, then Chief Judge of the Fourth Circuit, had checked into the matter at the time. Reached at his home in Baltimore, Judge Sobeloff said tonight that he remembered "a paper was filed, and we looked into it." But he declined to comment further until he checked his office files.

An official for the American Federation of Labor and Congress of Industrial Organizations, who asked not to be named, said he had checked back into the matter recently when Judge Haynsworth's name was mentioned in connection with the Fortas seat.

According to this official, the textile union received a long letter from Judge Sobeloff, giving a detailed report on his investigation, in which Judge Haynsworth was said to have made a statement to his fellow judges.

The official quoted Judge Sobeloff's letter as explaining that the Deering Milliken Company did about $100,000 gross business annually with the Vend-a-Matic Company—about 5 per cent of the vending company's annual business.

At some time before the court decision was rendered, the Vend-a-Matic Company had bid unsuccessfully on another $1,000-a-week contract with the Milliken company. After the court ruling, the Milliken company awarded the contract to a competitor of the Vend-a-Matic Company.

The union had also asked Judge Sobeloff about a Dun & Bradstreet report that Judge Haynsworth had resigned as first vice president of the Vend-a-Matic Company about Sept. 1, 1963. That was after the Deering case was argued but before it was decided on Nov. 15, 1963.

According to the union spokesman, Judge Sobeloff reported that Judge Haynsworth resigned his company post after the Judicial Conference of the United States adopted a rule barring Federal judges from acting as officers or directors of companies.

In his letter Judge Sobeloff was said to have expressed full confidence in Judge Haynsworth and to have declared the case closed.

The union official said that several years ago the Vend-a-Matic Company was acquired by Ara Services for 100,000 shares of Ara stock, then listed at about $35 a share. Ara Services is listed on the New York Stock Exchange, and yesterday its shares closed at 102¾ a share. Judge Haynsworth's former law partner, W. Francis Marion of Greenville, was president of Vend-a-Matic before it was acquired by the larger company.

A.J.C. OPPOSES JUDGE

The American Jewish Congress called on President Nixon yesterday not to appoint Judge Haynsworth to the Supreme Court.

In a letter to the President, Rabbi Arthur J. Lelyveld, president of the congress, said that during Judge Haynsworth's 12 years on the Court of Appeals "he has consistently voted for the strictest possible confinement of the desegregation rulings."

"On all of these issues," Rabbi Lelyveld said, "the Supreme Court has ultimately resolved the question adversely to the position taken by Judge Haynsworth. What this suggests is that, when free to decide cases unlimited by the rulings of a higher court—as he would be on the Supreme Court—Judge Haynsworth would vote to reverse the present trend toward prompt and effective desegregation."

[From the New York Times, Aug. 24, 1969]

JUDGE HAYNSWORTH HAD STOCK IN SUPPLIER TO CONCERN IN SUIT

(By James T. Wooten)

ATLANTA, Aug. 23.—Judge Clement F. Haynsworth, Jr., President Nixon's Supreme Court nominee, owned stock in a vending concern when he participated in a court decision involving a textile company that the vender dealt with.

The judge acknowledged the stock holding today in a telephone interview from his home in Greenville, S.C.

"But I did not recognize, then or now, any impropriety," he said.

As a member of the United States Court of Appeals for the Fourth Circuit, he cast the deciding vote in a 3-to-2 decision in 1963 that invalidated the findings of the National Labor Relations Board that Darlington Mills, Inc. had deliberately closed a factory to avoid a union election.

At the time, Judge Haynsworth owned stock in a company that held contracts with the parent corporation, Deering-Milliken, also a textile concern.

He had previously declined to answer questions on whether he had been a shareholder in Carolina-Vend-A-Matic, whose contractual relationship with the textile company resulted in an annual gross income of $50,000.

RESPONDS TO ARTICLE

Today, however, in response to a news article written by William J. Eaton of The Chicago Daily News, Judge Haynsworth said that not only did he not recognize a conflict of interest, but also "the President, the Attorney General now, and the Attorney General then saw nothing wrong with it."

His statement apparently implies that President Nixon and Attorney General John N. Mitchell have studied the report of an inquiry ordered by the late Senator Robert F. Kennedy, the former Attorney General, which cleared Judge Haynsworth of any conflict of interest charges raised by union leaders after the court decisions in 1963.

The disclosure of Judge Haynsworth's ownership of shares in Carolina Vend-A-Matic is considered unlikely by Washington sources to damage seriously his prospects for confirmation by the Senate. It had been widely assumed that he did own shares, since he was an officer of the Vendon 8 corporation, and had refused to comment when questioned about the matter.

While this financial interest does not seem to have been a violation of any law or any judicial canon of ethics, it does take on special significance because he was nominated to the vacancy created by Abe Fortas's resignation.

Because Mr. Fortas stepped down under fire for having accepted a questionable fee from the family foundation of Louis E. Wolfson, who is serving a prison term for stock fraud, the conflict-of-interest questions raised by Judge Haynsworth's stock ownership are particularly sensitive.

Thus far no Senators have expressed outright opposition to Judge Haynsworth, although several liberals have voiced displeasure at the conservative tone of his judicial record. The vending machine incident could give some of them a reason for voting "no."

Before the President's announcement, the National Association for the Advancement of Colored People and other civil rights groups had said they opposed the Haynsworth nomination, accusing the judge of impeding the progress of desegregation in Southern public schools.

Two days after the President made his choice public from San Clemente, Calif., George Meany, president of the American Federation of Labor and Congress of Industrial Organizations, attacked Judge Haynsworth's record and said Mr. Meany's giant amalgam of unions would oppose his confirmation.

HAD REMAINED SILENT

The judge, however, had remained silent amid the charges. In personal conversations and in more formal news conferences, he refused to discuss his views either on labor or on civil rights. "What I have written is on record and is available to anyone who is interested," he said.

But today, after the story's appearance in the Chicago newspaper, he said he was "mystified" by the resurrection of the 1963 charges. "Anyone who looks at this thing objectively, such as Attorney General Kennedy, President Nixon or Attorney General Mitchell, knows that there was absolutely no impropriety."

Judge Haynsworth, once a vice president of Carolina-Vend-A-Matic, had resigned that position as well as his hob as a director of the company before the decision in 1963.

Senator MATHIAS. Mr. Chairman, before I leave, if the Senator from North Carolina will bear with me one second further, I would like to thank Mr. Orfield for being here. He has made a scholarly and a penetrating presentation. It is a very excellent presentation, and I would say to you, Mr. Orfield, that you are the kind of man that makes this such a difficult proposition for us. Thank you very much.

Mr. ORFIELD. If I could answer your question, Senator Ervin, I would say that in the first place under HEW's procedures, they never require the closing of any particular school. They tell a school district that it is in noncompliance with the 1964 Civil Rights Act and ask the school district to propose a plan.

Senator ERVIN. Yes.

Mr. ORFIELD. That school district proposed a plan, as many southern school districts in conservative areas have, of closing up the black school because they did not want to contaminate white children by sending them to a black school. In this case, as in many other cases, the black community was not necessarily opposed to integration. They are opposed to the closing of the school with which they had been associated and would have preferred an integration plan that involved continuing use of that school.

I think Hyde County is also a perfect example of why freedom of choice does not operate. When I was down in that area in July, I happened to pick up the Hyde County newspaper, and it related a showdown between members of the black community there and the Ku Klux Klan in a shootout. This is the exact kind of situation that intimidates parents and makes them afraid to use the freedom of choice plan.

Senator ERVIN. Last year Congress passed a law that makes the use of any force or threat of force to intimidate any person in an effort to enroll or attend any school a Federal crime for which they can be sent to prison, so that is outlawed if the Department of Justice is performing its duty under the statute.

Now, are you saying that they did not put out regulations to say that if you want a share in this money you have got to comply with these standards?

Mr. ORFIELD. The school districts have a duty to come up with a plan to disestablish separate school systems that are unconstitutional.

Senator ERVIN. That is some interpretation but that is not in the amendment. That is a judge-made or a HEW-made law. I would call your attention to the fact that their position is directly opposed to the position that Congress took when it enacted the Civil Rights Act of 1964, and even Hubert Humphrey, the floor manager of the bill, stood on the floor of the Senate and on several occasions stated that the object of the bill was not to produce integration but to prevent discrimination. He was absolutely right about that, because this bill states what Congress meant by desegregation and what the Congress did not mean by desegregation. Section 401(b) consists of two clauses. The first clause provides that:

> Desegregation as used in title 4 means the assignment of the students to public schools and within such schools without regard to their race, color, religion or national origin."

And the second clause provides that:

> Desegregation as used in title 4 shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Mr. ORFIELD. Of course you are applying language in title 4 to regulations issued under title 6. I have also studied the legislative history of title 6.

Senator ERVIN. Senator Humphrey said that the language in title IV applied to title VI. Also in the same section, title IV, Congress

authorizes the Attorney General under certain circumstances to bring suits for two groups of people if he found that they could not bring suits themselves. One was children who are being deprived by the school board of equal protection of the laws, and the other were individuals who have been denied admission to a public college or permission to continue attendance at a public college by reason of race, color, religion, or national origin.

Congress went ahead and said in that same section, after providing for suits by the Attorney General, that—

> Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the courts to insure compliance with constitutional standards.

HEW has consistently violated title VI, because title VI authorized them to make rules of general applicability concerning financially assisted program. These are the powers it gave it:

> To effectuate the provisions of section 601 with respect to such programs by issuing rules, regulations or orders of general applicability which shall be consistent with achievement and objectives of the statutes authorizing the financial assistance in connection with which the action is taken and to enforce compliance with the requirements embodied in such rules, regulations or orders by withholding Federal financial assistance from—

And I call attention to this—

> the particular program or part thereof in which noncompliance with title 6 is found.

Instead of doing that, HEW said in effect if you do not meet this racial quota you cannot get any money, even though there had been no discrimination in any program.

Mr. ORFIELD. HEW has never had a racial quota.

Senator ERVIN. Yes they have; in effect.

Mr. ORFIELD. They have guidelines.

Senator ERVIN. It just depended. If you got such and such a percent in the schools of black students one year you had to step it up the next year some more. They had quotas and they were fixed so they would increase each year.

Now, Congress became concerned about the way HEW was not complying with its standards. So Congress enacted the following law in 1965. This is the Elementary School Act, Elementary and Secondary School Act of 1965:

> Nothing contained in this Act shall be construed to authorize any department, agency, office or employee of the United States to exercise any direction, supervision or control over the personnel of any school system or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

In the face of that law HEW continued its violation of the 1964 act and so Congress passed another law in 1968 when it made appropriations for the Department of Health, Education, and Welfare, and it said this in that law:

> No part of the funds contained in this Act shall be used to force busing of students, the abolition of any school or the attendance of students at a particular school in order to overcome racial imbalance as a condition precedent to obtaining Federal funds otherwise available to any State, school district or school.

And still HEW goes on its merry way, manifesting its contempt for three separate acts of Congress.

Mr. ORFIELD. Let me say, in the first place, in answer to that series of allegations, that you are dealing with legislative history. Title 6 can best be answered, I think, by reference to the Fifth Circuit's interpretation of that in the *Jefferson County* case.

Senator ERVIN. Yes, where the judge would not even quote the statute correctly.

Mr. ORFIELD. I think there is a very convincing analysis in the legislative history in that case. In the second place, I think you have systematically distorted HEW's procedures and accused them of many, many things that they do not in practice do and that they have commonly been falsely accused of doing.

Senator ERVIN. That is a fiction. It is just like the Federal judges who say:

> Why we do not force them to do it," and yet every school board member sits under a sword of Damocles, because the truth of it is he knows that if he does not carry out the will of the Federal judge he is going to be punished for contempt of court, and every one of the school districts that yield to the demands of HEW do it on the ground that they are going to deny him the funds if they do not assign students to schools to overcome a racial imbalance or achieve a balance. So to say that they act of their own free will is just about like saying when a robber sticks a gun in a man's face and says, "Your money or your life," and the man hands him his money you say, "Why he did this of his his own free will.

That is all I have to say.

Senator HRUSKA. Mr. Chairman, I should like to read just a few lines of the witness' testimony here, and then make a commentary on it citing Judge Walsh who was one of our other witnesses on this very point, and that is on page 7 of this statement, where the witness testified:

> Judge Haynsworth has recently said that it is unfair to judge him by his past decisions. "They're condemning opinions written when none of us was writing as we are now," he commented in response to civil rights groups' criticism. The *Prince Edward* case, however"—continues this witness—"demonstrates the inadequacy of his explanation.

I respect the right and the duty of this witness to express his conclusions of inadequacy, but may I call the attention of the committee, Mr. Chairman, to the fact that this was one of the issues that was very deliberately and extensively studied, in depth, by the Committee for the Federal Judiciary of the American Bar Association. I shall quote from the transcript now the testimony on this particular point of Judge Walsh, former Deputy Attorney General of the United States, former Federal judge, and now chairman of the Committee on the Federal Judiciary of the American Bar Association. He stated, and this comes from page 241 of the transcript in these hearings:

> In opinions which were in areas which inevitably would invite controversy, we can see that in those areas where the Supreme Court is perhaps moving the most rapidly in breaking new ground that he, Judge Haynsworth, has tended to favor allowing time to pass in following up or in any way expanding these new precedents. The areas in which you might notice this would be in the areas of civil rights but also in areas perhaps of labor law, and in the areas of the rights of seamen and longshoremen, for example, the Supreme Court has greatly expanded the old definition of seaworthiness and things like that. In all of these areas, whether they are politically sensitive or not, you can see the same intellectual approach on the part of Judge Haynsworth.

It was our conclusion, after looking through these cases, that this was in no way a reflection of bias. This was a reflection of a man who has a concept of deliberateness in the judicial process, and that his opinions were scholarly, well written, and that he was therefore professionally qualified for this post for which he is being considered.

That is the termination of the qnote from Judge Walsh's testimony.

Now, Mr. Chairman, I cannot expect this witness to agree with that conclusion if such witness or witnesses would criticize the idea of relying primarily upon litigation rather than administrative action in enforcing civil rights laws.

As for me, I am not ready to discard litigation and relegate it to the trash heap. A judicial court system is essential to settle any kind of dispute of this great degree of importance.

I believe that we should pay great attention to the dispassionate consideration and study of the Committee on Federal Judiciary of the American Bar Association which has some very eminent members of the American Bar among its membership.

Thank you for yielding, Mr. Chairman.

Senator HART. Mr. Orfield, isn't the core of your concern that the President turned and picked a nominee who was writing as he was writing opinions in those days notwithstanding the fact, and seemingly in contradiction of Judge Haynsworth's statement, that in those same days there were other judges who were writing opinions of the opposite view, and in your judgment the opposite view is the one which America's best requires of the Court? Isn't that the long and short of your message?

Mr. ORFIELD. What I have tried to do is, by referring to the development of the Supreme Court's positions and by referring to the judgments of other judges on his own court, illustrate that step by step Judge Haynsworth seems to be behind, seems to be insensitive to what I thought were legitimate issues raised by a litigant and seemed to approve of almost endless local dilatory action in enforcing constitutional rights.

Senator HART. The point that no one was writing opinions—what did he say on being judged by opinions——

Mr. ORFIELD. That were "written when none of us was writing as we are now."

Senator HART. Well, the hard truth is that others were writing different opinions.

Mr. ORFIELD. Yes.

Senator HART. The significance of this appointment is that the President turned to one who was behind the parade rather than with the parade.

Mr. ORFIELD. I think that that is the entire political——

Senator HART. Now, if that is the case, what do you say to the argument that, well, that is what was decided in November?

Mr. ORFIELD. It seems to me that anybody who can determine what was really decided in Novmber, with an election that close, saying that this represents a national decision to turn away from the cause of equal rights, will have a difficult time sustaining that case.

I believe personally that at the present moment, with the election being what it was, the President's mandate is weak relative to that of Congress. He represents only 40-odd percent of the public, and I do

not believe that the argument is true that only the President need make a judgment on this. I believe the Congress as well has an obligation to make a judgment.

Senator HART. In each of the cases, the opinions which you were discussing, there were other Federal judges who were writing opposite opinions?

Mr. ORFIELD. Yes, other southern Federal judges.

Senator HART. So in a sense, what is special about this nominee? What is it about him that distinguishes him? I have never bought the idea that the Senate should sit around and debate the question whether this is the best man in all America to go on the Court. First of all, how do you define the best? In any event, I have never been hung up over that problem. But I think it is a fair question to raise, what is there that is special? What is extraordinary, what special gifts, if any, are demonstrated?

The one thing that seems special about this fellow is that he was moving slowly in the area which has really been the breaking point in this very committee over judicial nominees in the last 10 years. The criticism that the chairman of this committee has voiced with respect to nominees in the past, criticism the able senior Senator from South Carolina, also a member of this committee, has voiced, has hinged over this basic question. What kind of man should go on that Court with respect to his attitude in the area of No. 1 domestic priority, the civil rights question? The thing that distinguishes Haynsworth is that in the eyes of those critics of earlier nominees, he looks good. That is one distinguishing feature.

Now, to a more, I suppose, traditional and less personal kind of observation, you were asked what race relations are like in the North, and they are of such a character as to require the avoidance of symbols that would further deteriorate an already bad relationship.

Mr. ORFIELD. I believe that this appointment would not only undermine the legitimacy of the Supreme Court with important elements of the American population, but also, because of the ethical questions that have been raised, diminish its prestige and standing very broadly outside the community of people who are deeply concerned about civil rights issues. In that community I think the demoralizing effect would be very very strong.

Senator HART. That position is consistent with the testimony that was given to this committee yesterday by eight Members of the House of Representatives, all black, five of whom came over here in a body yesterday. They said, among other things, in opposing the Haynsworth nomination that even more important, "We do not think that the irony of this appointment will be lost on black Americans who have been told to use the courts as legal means for redress of grievances."

If that is correct, and I have no reason to doubt it, then confirmation of Haynsworth would damage an already unsatisfactory relationship between the races.

Mr. ORFIELD. I am certain that that is true. The opportunity for me to live in the South and travel through several Southern States this summer gave me a sort of test of opinions among many people who have been involved in civil rights struggles for a long period of time.

One of the deeply disturbing things I found in the minds of men, who had been optimistic and hopeful in fighting for civil rights progress through the courts, is an increasing skepticism and almost despair, and I think that this action in addition to, when added to the actions of the Nixon administration in a variety of civil rights enforcement programs, would drive more and more moderate southern civil rights leaders who have maintained faith in the governmental system to the verge of despair in that system.

Senator HART. Last, and this is only for balance in the record, the eight Congressmen who testified yesterday against the nomination all were Democrats, I confess, but also much later yesterday afternoon we had similar testimony making the same point from the Republican chairman of the 13th Michigan Congressional District, a black man, voicing the same concern, cautioning us as to what the signal was, the symbolism, the impact, the implications, and I think each of us should ask ourselves the question: Are those witnesses correct? If they are, then an affirmative vote would be pretty tough to suggest.

Thank you.

Senator HRUSKA. Mr. Chairman, on this point of criticizing the nominee, because he is not as advanced in the field of civil rights as the Supreme Court is, I would simply like to point out that the most casual reference to the landmark decisions in the field of civil rights shows that the Supreme Court of the United States has been ahead of virtually all the lower courts of the land.

It is not only the Circuit Court of Appeals of the Fourth Circuit or of Judge Haynsworth.

I have here, Mr. Chairman, a listing of decisions going up to the Supreme Court from various district and circuit courts. I should like to have it inserted in this record at the conclusion of my remarks. They come from all over, the western district of Oklahoma, for example.

Brown v. *Board of Education of Topeka*, 347 U.S. 483, came from a Federal district court in the district of Kansas. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, reversed a contrary opinion of the Supreme Court of Delaware.

Senator ERVIN. If the Senator will pardon me interjecting myself, the *Topeka* case was the original *Brown* case from which it got its name and the judges in that case put exactly the same interpretation on the *Brown* case and the Constitution that Judge Parker did.

Senator HRUSKA. I am glad to get that additional information.

Goss v. *The Board of Education*, 373 U.S. 683, was one of the leading cases in the testimony given yesterday by the Leadership Conference on Civil Rights. That was a reversal of a judgment of the Federal court of appeals, not of the fourth circuit, but of the Circuit Court of Appeals of the Sixth Circuit whose headquarters are in Cincinnati. There are other examples, so surely there was a division among lower courts. That is what the Supreme Court is for. It adjudicates those cases and resolves issues it deems to be of importance.

I cannot help feeling that it is a little bit inconsistent to praise the Supreme Court for breaking new ground in the field of civil rights on the one hand, and then criticizing the judge of a lower Federal court for not having been as advanced as the Supreme Court has been.

I am quite doubtful that we would want a judge of the lower Federal courts or judges of the lower Federal courts constantly departing from existing law on their own, because if new constitutional doctrine is to be made, I do not mean legislation, I mean new constitutional doctrine, if it is to be made, the better place to make it would be the Supreme Court of the United States, and not the lower courts.

I certainly do not agree with all of those opinions of Judge Haynsworth in the field of civil rights which I have read and which have been discussed here, and doubtless would not agree with some of his decisions in other areas, but I am quite certain that I would have the same reaction to just about any other nominee who would come before this committee, and they would include, for example, Justice Thurgood Marshall, former Justice Goldberg and the others.

I do not think that the criticism of Judge Haynsworth for not being as advanced as the Supreme Court in the field of civil rights is a fair one. He seems to have faithfully followed the precedents as he understood them in those of his opinions which have come to our attention.

Judge Walsh had this to say at page 255 of the transcript:

Now I do not mean in any way to suggest that I thought Judge Haynsworth was running against the stream of the law. I think he was punctilious in following that stream as the Supreme Court laid it up, and in some fields he has run ahead and broken new ground. For example, in the expansion of the doctrine of the utility of habeas corpus, he broke away from an old restraint in earlier Supreme Court opinions and was complimented by the present Supreme Court for doing so. He has moved over into, as I recall it, more modern tests on insanity and things of that kind.

So he is in no sense running against the stream of the law. If I were going to characterize it, I would say where new ground is being broken by the Supreme Court, he believes in moving deliberately rather than rapidly and particularly where an interpretation of the Constitution which has stood for many years is reversed or turned around.

He would perhaps give more time than other judges to adjust to the new state of affairs.

Mr. Chairman, I ask unanimous consent that this listing of cases and the narrative on them be inserted at this point in the hearing record.

The CHAIRMAN. It will be so ordered.

(The material referred to by Senator Hruska for inclusion in the record follows:)

I am bound to say that I am seriously concerned by the claim of Judge Haynsworth's opponents that he is hostile to civil rights and to the aspirations of minorities. I would be most reluctant to vote favorably on the confirmation of any Supreme Court nominee against whom that charge could fairly be made. I have therefore tried to pay close attention to the arguments of the opponents on this point, and to give the matter careful attention on my own.

The case that Judge Haynsworth's opponents make against him in the area of civil rights, as I see it, is basically that he is not as advanced on that subject as the Supreme Court of the United States. Certainly there are cases which indicate that this is true, but I think it unfair to criticize Judge Haynsworth or the Court of Appeals for the Fourth Circuit on which he sits without considering the entire development of the law in this area in the last twenty years.

The most casual reference to the landmark civil rights cases shows that the Supreme Court of the United States has been ahead of virtually all of the lower courts in this area, and not just of the Court of Appeals for the Fourth Circuit or of Judge Haynsworth. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, decided in 1950, requiring state supported graduate schools to treat Negroes and whites alike, was a decision which reversed a three-judge federal court sitting in the Western District of Oklahoma.

The great landmark case of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, in which the Supreme Court finally held that segregated public schools were unconstitutional, was a reversal of a judgment entered by a three-judge federal district court in the District of Kansas.

Burton v. *Wilmington Parking Authority*, 365 U.S. 715, decided in 1961, in which the Supreme Court of the United States greatly expanded the concept of "state action" under the Fourteenth Amendment, reversed a contrary opinion of the Supreme Court of Delaware.

Indeed, *Goss v. Board of Education*, 373 U.S. 683, which is referred to in the helpful and carefully prepared statement of the Leadership Conference on Civil Rights before this Committee, was a reversal of a judgment of a federal court of appeals—not the Court of Appeals for the Fourth Circuit, on which Judge Haynsworth sits, but of the Court of Appears for the Sixth Circuit, whose headquarters is in Cincinnati.

Other federal courts as well have not been as advanced in the civil rights area a the Supreme Court. *McNeese* v. *Board* of *Education*, 373 U.S. 668, decided in 1963, for example, was a reversal of a decision of the Seventh Circuit Court of Appeals. The Eighth Circuit was reversed twice last year and once this last term by the Court in civil rights cases. *Raney* v. *Board of Education of Gould School District*, 391 U.S. 443 (1968); *Jones* v. *Mayer*, 392 U.S. 409 (1968); *Daniel* v. *Paul*, 395 U.S. 298 (1969).

The decisions of a number of special three judge courts have similarly been overturned. *Anderson* v. *Martin*, 375 U.S. 399, decided in 1964, reversed the lower courts decision upholding a Louisiana law requiring racial designations of candidates to be shown on the ballot. And *Katzenbach* v. *McClung*, 379, U.S. 294, decided in 1964, upheld the constitutionality of the Civil Rights Act of 1964, as applied to a restaurant, after the lower court had enjoined the act's enforcement on the ground that it exceeded the powers of Congress.

Those of us who support civil rights have on more than one occasion commended the Supreme Court of the United States for its pioneering efforts in this area of the law. But I cannot help feeling that it is a little bit inconsistent to praise the Supreme Court for breaking new ground in the field of civil rights, on the one hand, and to criticize the judge of a lower federal court for not having been as advanced as the Supreme Court, on the other hand. I am quite doubtful that we would want judges of the lower federal courts constantly departing from existing law on their own—if new constitutional doctrine is to be made, it should very probably be made by the Supreme Court of the United States.

While I certainly do not agree with all of those of Judge Haynsworth's opinions in the field of civil rights which I have read, and doubtless would not agree with some of his decisions in other areas, I am quite certain that I would have the same reaction to just about any other nominee who would come before this Committee. I do not think that the criticism of Judge Haynsworth for not being as advanced as the Supreme Court in the field of civil rights is a fair one, He seems to have faithfully followed the precidents as he understood them in those of his opinions which have come to our attention.

Mr. ORFIELD. I would like to respond to your question, Senator Hruska, by saying that I do not believe that Judge Haynsworth is merely running behind the Supreme Court, is merely failing to anticipate the Supreme Court decisions. He was the deciding vote in his court in failing to respond to new local challenges to a desegregation process, in permitting further delays after many years had gone by in implementing the basic principles of constitutional law. His court was often behind the Fifth Circuit Court of Appeals, which as I said dealt with much more grave problems and much more grave resistance.

Senator HRUSKA. Mr. Orfield, are delays bad per se?

Mr. ORFIELD. They are——

Senator HRUSKA. Is a delay bad merely because it is a delay, or would you rather, as a lawyer and as a student of the law, in all justice to yourself as well as to the judge who orders a delay, ask yourself whether there is a good legal reason for delay, for example, letting the Supreme Court of Virginia decide whether the State of

Virginia or the counties of Virginia have jurisdiction over the school system.

The approach that most lawyers that I know would not be to say this decision delays and therefore it is bad. The decision of the lawyer usually is based upon an examination of the assignment of error and the evidence. The conclusions are based upon a consideration of all those things. Then they judge whether this matter should be delayed for further proceeding, or until further evidence comes in, or for whatever reason. Don't you think that is a more reasonable way to go about it?

Mr. ORFIELD. Senator, in the history of the school desegregation process in the South after 1954, the fact that confronted the litigants that were trying to obtain a basic constitutional right announced by the Supreme Court was that they were confronted by one delay after another after another, delays not intended in very many cases to examine serious legal issues, but delays merely for the purpose of delay, and delays which permitted higher generations of black students to grow up in unsegregated schools.

In this particular case that you speak of, two judges on his court found this particular delay in Prince Edward, "a humble acquiescence in outrageously dilatory tactics." Those were serious judges very familiar with the facts of the case.

Senator ERVIN.That was Judge Bell's statement. Judge Bell was a very liberal judge in the much-abused modern use of the term. I hate to say that because you should speak no evil of the dead, but that is what he was.

Mr. ORFIELD. You think he was a very liberal judge to enforce a consitutional decision after 10 years?

Senator ERVIN. I am a liberal myself. I believe in freedom.

Senator HRUSKA. Of course, Judge Haynsworth in *Griffin* v. *Board of Supervisors in Prince Edward County*, 322 Fed. 2d 332, a 4th circuit case, wrote for a majority of the 4th circuit.

Mr. ORFIELD. He decided that it was a majority.

Senator HRUSKA. Pardon?

Mr. ORFIELD. I believe he had a decisive vote in that case.

Senator HRUSKA. He wrote for the majority of the fourth circuit, "The closing of schools to avoid integration was not in violation of the Federal Constitution."

Senator HART. In other words, at that moment there were two judges writing differently?

Mr. ORFIELD. Yes.

Senator HRUSKA. I would find it most difficult to say, first of all, that Judge Haynsworth was unique in his position, and secondly, that he was dilatory in view of the many appeals and reversals of civil rights decisions rendered by other circuit courts, district courts' and State supreme courts The delays are criticized by those who were not getting their particular way in the case. I still say our judicial system must be orderly and we ought to have some respect for it and follow it, rather than to try to discard it and say anything that comes along that delays what we particularly want is no good.

The CHAIRMAN. Senator Thurmond?

Senator THURMOND. Mr. Chairman, I have no questions

The CHAIRMAN. Senator Cook?

Senator COOK. I have no questions.

The CHAIRMAN. Call the next witness.

Senator ERVIN. Just one thing. You extoll the fifth circuit. The fifth circuit case they have got to have integration regardless of anything else, and in United States against a school district they said that safety of the children was of secondary importance in integration, that the school board would have to make little black children cross a bayou where their life and limb was in peril to get to white schools to mix them racially, and little white children had to cross the bayou to get to colored schools to mix them racially, and that the school board could not take into consideration what they thought about the safety of children unless it produced integration.

In another case, in other cases they held that they should ignore the density of population of a district, the proximity of the residences of schoolchildren to the schools, and natural boundaries created by God and nature, and they even went so far in the one case as to say that even a nondiscriminatory action by a school board is unconstitutional if it fails to result in substantial desegration. Now you can extoll things like that but I cannot.

Senator HART. Mr. Chairman, not to extend the debate, but at least to suggest another way to interpret Judge Haynsworth's delay in the *Prince Edward* case, as a witness told us yesterday, that business of abstention, which was what was involved, was a matter of discretion by Judge Haynsworth. It is not a policy requirement, it is not an obligation of law. As the witness yesterday reminded us, it is not like the rule requiring you to exhaust your administrative remedies before going to court and where if you fail to exhaust the administrative remedies you are dead.

The decision in the *Prince Edward* case was wholly discretionary and the significance at least to me is that he exercised discretion in a direction 180 degrees opposite from what history and the pressures of today's domestic problems suggest is desirable. I agree that that is a very significant case, and the exercise of discretion to wait some more to me has great meaning.

Senator HRUSKA. Is that the *Prince Edward* case that you are talking of?

Senator HART. The one where Judge Bell, the flaming liberal said, you know, 9 years is enough, or whatever he said.

Senator HRUSKA. May I say, if the Senator will yield, that it was held in that case, and it was a majority of the circuit court so holding, that the county alone could close its public schools entirely regardless of its motivation for doing so, and his view was that the Constitution prohibited a county from discriminating in its public schools but did not require the county to furnish public schools.

Senator HART. He said there was no discrimination if you close the schools.

Senator HRUSKA. Just a minute. The Senator is a very fair man and I think he will recognize there is a good basis for Judge Haynsworth's opinion which was written with the blessing of the majority. He thought the issue that was presented was controlled by the court's

decision in *Tomkins* v. *The City of Greensboro*, 276 Fed. 2d. 890. It is a Fourth Circuit case decided in 1960, which held that a city could sell a public swimming pool to private parties to avoid segregation of tbe facility.

Now the *Tomkins* case was a per curiam decision joined in by Chief Judge Sobeloff, Judge Soper and Judge Haynsworth. Therefore Judge Haynsworth's reliance on that case, while incorrect in the Supreme Court view, was the law that was thought by a majority of the circuit court to be applicable in that circuit to the case at hand. In addition there was a very fundamental legal problem presented, to wit, where is the jurisdiction of the schools within the State of Virginia? Is it in the county or is it in the State? The majority said on that issue that should be the problem and the province of the Supreme Court of Virginia to decide.

Mr. ORFIELD. I do not think that you would seriously maintain, Senator, that there is an analogy between the importance of an opportunity to swim in a public swimming pool and the opportunity to attend school?

Senator HRUSKA. I am not making the analogy. It was cited and depended on by a majority of the Circuit Court of Appeals. The Supreme Court reversed and that, of course, it had the authority to do. That is fair. But if the Fourth Circuit had taken the contrary position, they would have been in contradiction to a previous decision. They have respect for their own decisions particularly when the decisions are based upon principles of law which they thought were good when they made that decision in 1960.

Mr. ORFIELD. If you will read the dissenting opinion in that case you will see a number of cases citing law to the opposite conclusion. I think Judge Haynsworth's analysis in that case, closing a public school system, closing out the whole opportunity for education of a whole generation of children, was far more serious than cutting off a Federal-aid program. Your suggesting that perhaps it could be controlled by a case involving the shutting down of a swimming pool shows an extreme insensitivity to the needs of those children and the urgency and centralness of public education which was recognized by the Supreme Court in its 1954 decision.

Senator HRUSKA. I have no further questions, Mr. Chairman.

Senator ERVIN. Neither do I.

The CHAIRMAN. Call the next witness.

Mr. HOLLOMAN. Henry L. Marsh.

(No response.)

Mr. HOLLOMAN. Julius Chambers.

(No response.)

Mr. HOLLOMAN. J. Otis Cochran.

Senator HART. Mr. Chairman, it is my understanding that earlier today, witnesses were called who failed to respond. They have not responded. It was our understanding that if that occurred, then at the conclusion of the witness list, those who had been called and who had not responded would then be at the bottom of the list.

The CHAIRMAN. That will be done. Thank you. That was the understanding.

TESTIMONY OF J. OTIS COCHRAN, NATIONAL CHAIRMAN, BLACK AMERICAN LAW STUDENTS ASSOCIATION, ACCOMPANIED BY ERIC CLAY AND HAROLD McDOUGALL

Mr. COCHRAN. Members of the Senate Judiciary Committee, ladies and gentlemen, I am J. Otis Cochran, national chairman of the Black American Law Students Association, and a 2d-year student at Yale Law School.

Accompanying me are two members of the Black American Law Students Association, Mr. Harold McDougall to my right and Mr. Eric Clay to my left.

The Black American Law Students Association requested an opportunity to testify on the appointment of Mr. Haynsworth for two reasons. First of all, we are close to it, and second, we are concerned over the obvious absence of representatives of the poor and the young from these hearings.

To the extent that we represent the presence which has been absent throughout the course of these hearings, we do not do so as legal experts, but as part of a significant group of Americans which has no faith in the substance of American democracy as it operates.

You have received a copy of my testimony. I will skip the discussion of the cases that Mr. Haynsworth participated in, and speak to the general concerns that the Haynsworth nomination have aroused, after which we will entertain any questions which you may pose.

The Supreme Court has become involved in open political controversies that have caused a diminished respect for it from large portions of the American people. In particular the numerous hints of undue extrajudicial influences upon court members and the repeated statements of President Nixon during the presidential campaign last year that he would appoint judicial conservativies to the Court have discouraged those who have come to regard that institution as the most important force for the preservation and enlargement of rights of every American. But particularly, of course, of the rights of those who lack the political and economic power which we need in order to exercise our guardianship of these rights.

The fundamental role of the Court in our society is to insure all citizens the protection of the rights guaranteed to them by the Constitution. Because the oppressed black people and the poor of all races have little influence over the decisionmaking process in the executive and legislative branches, they have had to rely upon the courts to protect those rights which have been disregarded and violated by them often.

Throughout history, this Republic has had to deal with a black presence which by its own laws and public policies that Republic has made troublesome.

In recent years Americans in positions of power have by accident or design carried out policies which have made it necessary for black people to politicize their presence in this country. Now perhaps we can come to a time when the law will function well enough institutionally so that this extra step to the attainment of first-class citizenship is no longer necessary.

Maybe we will come to a point when equal justice for all has become a reality rather than simply an empty slogan. In other words, we come to a point when the politicizing of the black presence has become unnecessary, for then this country will have achieved a single class of citizenship for all those who live under its laws.

But today I am here to address the situation as it is, not as it may be some day in the future. Today it seems that we must constantly assault our Government for a just remedy or we must abandon the instruments and devices which have been established by it. Yet each of these strategies wreaks its own special kind of havoc and neither offers comfort—gentlemen, I use comfort in a very, very narrow sense, for black people in this country do not seek ease, black people in this country do not seek preferential treatment. We do, however, seek a system which does not turn the assertion of the rights of black people into a political issue to be tossed back and forth among publicity seeking politicians like some kind of football.

Now such a situation must unfortunately undermine our confidence in and our attachment to a country which we feel is not without some potential for the attainment of democratic institutions and processes.

Our sincere desire to see this country act in good faith on its problems to all citizens seems to fly in the face of the satisfaction and comfort of a large mass of faceless, forgotten Americans.

Now we agree that law and order provides protection to a nation's citizens, and affords a context within which these citizens can live meaningful lives, but the traditional complement to law and order, gentlemen, in fact its prerequisite is the existence of a justice sufficiently pervasive so that no substantial portion of the citizenry perceives the law as a cynical pronouncement which says, "We have got what we want and we are going to keep it that way regardless of anything you have to suffer."

I have been talking as if the majority of black people are only awakening to the fact that the American system of law and order on the whole does not work for them. Such is not the case. It is becoming more and more clear to a large number of black people that the majority of this society has destroyed meaningful institutions in the black community or prevented their growth while at the same time offering in their place institutions which were designed by, promulgated by and work for white people, for you gentlemen.

It is little wonder, then, that so many of my black brothers have little respect for the judicial process, or for that matter the law, because it is so obvious that it does not work for them, does not work for us, gentlemen.

Many of my brothers believe that the law, far from being a guarantor of their rights, is instead an instrument of oppression.

The picture is not bright. There are no more urgent domestic problems than those revolving around the black presence in this Nation. The fact that our cities are torn by racial conflicts, that indeed the entire American community is being increasingly polarized along racial lines is too obvious and too familiar to require documentation.

In such a situation it is imperative that any appointee to the Supreme Court bring with him the highest degree of commitment to the principles of justice as well as the principles of order. It is my belief

that measured by such a standard, Judge Haynesworth falls woefully short. His statements and opinions have hardly been innovative in the area of civil rights. He is, in fact, among those judges who have done their best to retard the implementation of the landmark school desegregation decision of *Brown* v. *Board of Education*, so much so that 15 years after that decision vast areas of this country still have made no progress in achieving its implementation.

Haynesworth has on many occasions shown what is either a deliberate and calculated opposition to the law of the land, or a near incredible inability to discern the real meaning of Supreme Court decisions. For on too many occasions the higher Court has found it necessary to overturn his decisions.

The extent to which Judge Haynesworth is out of step in his thinking in matters relating to the vindication of the constitutional rights of black people is most clear in the series of school desegregation cases in which the Supreme Court has reversed his decisions. It is in this area furthermore that the Supreme Court mandate for desegregation has been more clear.

The typical Haynsworth opinion pays lip service to the principles of desegregation while further delaying relief to black civil rights complainants by remanding cases to the district courts for further investigation, referring to grant relief pending State court action, or simply granting inadequate relief.

The last reversal took place in 1968. Let me repeat that. The last reversal occurred in 1968, just a year ago, indicating that Haynsworth has continued to misunderstand grievously the nature and the intent of the Supreme Court decisions on school desegregation right down to the present day.

He has, in other words, gentlemen, successfully resisted education on this most fundamental issue for 15 long years, for 15 long years.

It would be a travesty now to put him in a position of promulgating his rejected standards from the highest court in the land. If there has been any progress in Haynsworth's record in school desegregation cases, it has only come from outright subversion of *Brown* to a kind of grudging acceptance which has actually had the same old effect of delaying the achievement of racial balance in the schools.

The pattern is clear. Haynsworth would delay integration whenever possible, and only in those cases where great ingenuity could simply find no respective way to avoid a prointegration ruling has Haynsworth allowed himself to issue orders.

Perhaps the clearest reflection of Haynsworth's judicial philosophy is seen in a group of cases challenging racial segregation in health facilities, where he has stated his views on the obligation of quasi-public facilities to comply with the requirements of the 14th amendment.

Now, even as other judges on the Fourth Circuit Court of Appeals have liberalized their thinking and their voting patterns in civil rights cases, Judge Haynsworth has conspicuously failed to do so. Judge Haynsworth's dogged adherence to constitutional views which are at war with the struggle of black people for their due rights is distressingly well illustrated in this series of cases challenging segregation in health facilities.

According to Haynsworth, the Federal court has no responsibility to black plaintiffs attempting to vindicate their civil rights, and to hospitals where they are supposed to provide essential health services to the entire community. The concept that public moneys cannot be channeled into the hands of those who would discriminate on the basis of race is merely beginning in the struggle for equality.

Yet Haynsworth apparently views such a concept as subversive of the judicial process.

Such a ruling was to him an action so far removed from the proper scope of judicial action that he could barely bring himself to approve of it even after it had been firmly established as the law of the land.

Now, while no consistent pattern has emerged from Haynsworth's position in cases involving the desegregation of other facilities, the same regressive and obstructionist tendencies have come across in a number of cases. In 1959 he voted in favor of the circuit courts holding that discrimination practiced by privately owned restaurants did not contravene the 14th amendment. In 1968 he joined the Court in holding that a State courthouse was under no obligation to remove racial signs in public rest rooms.

At other times Haynsworth joined court opinions which enlarged the scope of the Civil Rights Act and enjoined discriminatory practices in some areas. But the very fact of his inconsistency shows his insensitivity to the principles which I have discussed.

It apparently has been easy for him time and time again to look for ways to avoid if not actually subvert the intent and the spirit of Supreme Court decisions and congressional legislation. The same attitude appears in a number of cases involving petitions filed by defendants seeking removal of trials from State to Federal courts on the grounds that fair trials in their respective State courts would be impossible because of jury discrimination.

Judges Sobeloff and Bell dissented from these decisions, asserting in one that "The extremely narrow construction which the majority gives to the removal statute comports neither with its historical context nor its present language nor the spirit of those decisions of the Supreme Court which have been given new breadth and meaning to the constitutional guarantee of equal rights to all citizens or to the intent and purposes of the 1964 Civil Rights Act."

In other words, Judges Bell and Sobeloff captured the essence of Clement Haynsworth, the narrowness of his vision, the pettiness of his outlook, his fundamentally negative attitude toward the effort to make justice a more meaningful reality in the lives of all the American people.

Judge Haynsworth has, throughout his career, stood for obstructionist technique and philosophy, squarely contrary to the whole thrust of modern Supreme Court decisions. His appointment to that post would now make a mockery of the path the Court has forged over the last 15 years.

The appointment of a new Supreme Court Justice is a major event in the history of this country. I need not tell you that, gentlemen. I am sure you are aware of that. The nine men who sit on that Bench should represent the best that we can summon from among us.

A solid background in the law itself was obviously a prerequisite

for such an appointment but that is only the first criterion that we should expect these men to meet. An unquestioned integrity is essential. But more than that, a compassion, a breadth of vision, a deep understanding of all the social currents that swirl about our society are absolutely imperative in any appointee, if he is to have the confidence of this Nation, if he is to live up to the honor and responsibility of his office.

The black law students of this country are perhaps more acutely aware than anyone else of the necessity for opening the entire judicial system to the participation of all the American pepole. When so many voices are shouting about the immorality of the legal system, its oppressive nature, its doors that so often remain closed to the poor and the black, that is not the time to elevate to the Supreme Court a man who has used the law as a means of slowing down the progress of the poor and the black in their effort to gain full entry into American society. When so many American institutions face searching doubt and cynicism from so many segments of society, that is not the time to elevate to the Supreme Court a man who will command so little respect and confidence from those segments which are feeling themselves to be so very alienated from this system.

Clement Haynsworth we submit has condoned and has himself participated in some of the bleaker chapters of recent judicial history and as such he stands as a symbol of the continued failure of American society to make good on its promises to all of its citizens. The approval of this appointment will mean that our Senators agree with our President, that the most qualified man we can find to sit on the highest Court is a man who has never stood for progress in human rights.

His appointment will insure disappointment and disenchantment among various segments of the poor, the young and the black of this country. In an hour that calls out for the appointment of a man who will lend dignity and prestige and an aura of confidence to the Court, the Nation is offered instead a man whose understanding of and whose commitment to principles of justice and equality raise serious doubts in many minds.

The black law students of this country expect better of you Senator. Indeed, the whole country expects better of you.

In his famous attack on the Catiline conspiracy in ancient Rome, Cicero asked, "How long, O Catiline, will you go on abusing our patience?"

We would paraphrase that question now and present it to you, members of the U.S. Judiciary Committee, "How long, O brokers of power, will you go on abusing the patience of those who await the day when 'of the people, by the people and for the people' is no longer an empty rhetorical phrase."

Our patience, Senators, like the patience of your forefathers who dumped tea in the Boston Harbor, is not inexhaustible. We urge you to reject this nomination.

(The prepared statement follows:)

STATEMENT OF J. OTIS COCHRAN

Events of the past year involving the Supreme Court have had a more than unfortunate effect on the prestige and influence of that great body. For the first time in many years, the Court has been involved in open political controversies

that have caused a diminished respect for it among large portions of the American public. In particular, the numerous hints of undue extrajudicial influence upon court members and the repeated statements of President Nixon during the presidential campaign last year that he would appoint judicial conservatives to the Court have discouraged those who have come to regard that institution as the most important force for the preservation and enlargement of the rights of every individual American—but particularly, of course, of the rights of those whose lack of political and economic power has made it difficult, if not impossible for them to exercise the guardianship of those rights themselves.

The fundamental role of the Court in our society is to ensure to all citizens the protection of the rights guaranteed to them by the Constitution. Because the politically weak—black people and the poor of all races—have had little influence over the decision-making process in the executive and legislative branches, they have had to rely upon the courts to protect those rights which have been at best disregarded by those branches, and at worst violated by them.

Throughout its history this Republic has had to deal with a black presence which by its own laws and public policies that Republic itself has made troublesome. In recent years Americans in positions of power have by design or accident carried out policies which have made it necessary for black people to politicize their presence. It is my hope, and I believe the hope of a number of other Americans, that we can and will come to a time when the law will function well enough institutionally so that this extra step to the attainment of first class citizen will no longer be necessary. When equal justice for all has become a reality rather than a slogan, in other words, the politicization of the black presence will have become unnecessary, for this country will then have achieved a single class of citizenship for all those who live under its laws.

But I am here to address the situation as it is today, not as it may be someday in the future. Today, it seems that we must constantly assault our government for a just remedy or we must abandon the instruments and devices which have been established by it. Yet each of these strategies wreaks its own special kind of havoc; neither offers comfort. I use "comfort" in a very narrow sense, for black people in this country do not seek ease; black people in this country do not seek preferential treatment. We do, however, seek a system which does not automatically turn the assertion of the rights of black people into a political issue, to be tossed back and forth among publicity-seeking politicians like a football. Such a situation must, unfortunately, undermine our confidence in and our attachment to a country which we feel is not without some potential for the attainment of truly democratic institutions and processes. Our sincere desire to see this country act in good faith upon its promises to all its citizens seems to fly in the face of the satisfaction and comfort of a large mass of faceless "forgotten Americans". We agree that law and order provides protection to a nation's citizens and affords a context within which these citizens can live meaningful lives. But the traditional complement to law and order—in fact, its prerequisite—is the existence of a justice sufficiently pervasive so that no substantial portion of the citizenry perceives the law as a cynical pronouncement which says "We've got what we want and we will keep it that way, regardless of any expense *you* may have to suffer."

Actually, I have been talking as if the majority of black people are only awakening to the fact that the American system of law and order, on the whole, does not work for them. Such is not the case. It is becoming more and more clear to large numbers of my people that the majority of this society has destroyed meaningful institutions in the black community or prevented their growth, while at the same time offering in their place institutions which were designed by, promulgated by, and work for whites. It is little wonder then that so many of my black brothers have little respect for the judicial process, or for that matter, the law, because it is so obvious that it does not work for them. Many of my brothers believe that the law, far from being a guarantor of their rights, is instead an instrument of oppression. I am here today because I am not yet convinced that this is so.

The picture is not bright. There are no more urgent domestic problems than those revolving around the black presence in this nation; the fact that our cities are torn by racial conflicts, that indeed the entire American community is instead an instrument of oppression. I am here today because I am not yet to require documentation.

In such a situation it is imperative that any appointee to the Supreme Court bring with him the highest degree of committment to the principles of justice as well as the principles of order. It is my belief that measured by such a standard, Judge Haynsworth falls woefully short. His statements and opinions have been hardly innovative in the area of civil rights; he is, in fact, among those judges who have done their best to retard the implementation of the landmark school desegregation case, *Brown v. Board of Education*, so that 15 years after that decision, vast areas of this country have still made no progress in achieving its implementation. Haynsworth has on many occasions shown what is either a deliberate and calculated opposition to the law of the land, or a near-incredible inability to discern the real meaning of Supreme Court decisions, for on too many occasions the higher court has found it necessary to overturn his decisions.

The extent to which Judge Haynsworth is out of step in his thinking in matters relating to the vindication of the constitutional rights of black people is most clear in the series of school desegregation cases in which the Supreme Court has reversed his decisions. It is in this area, furthermore, that the Supreme Court mandate for desegregation had been most clear. The typical Haynsworth opinion pays lip service to the principle of desegregation while further delaying relief to black civil rights complainants by remanding cases to the District Courts for further investigation, refusing to grant relief pending state court action, or simply granting inadequate relief.

In a famous case involving Prince Edward County,[1] for example, Judge Haynsworth cast the deciding vote in an opinion which denied relief to plaintiff in a suit to require reopening of public schools and the cessation of allocation of public funds to pay tuition grants to white students attending racially segregated private schools. Haynsworth relied on the discretion of state courts in interpreting Virginia law at a time when the political situation indicated that Virginia's interpretation of its own law would be far from objective and in the face of flagrant violations of *Brown* v. *Board* by school administrators. He was reversed[2] by the Supreme Court which recognized that decisions such as this one guaranteed delay in the implementation of the *Brown* mandate.

In a case involving the integration of various school teaching staffs in Richmond, Virginia,[3] Haynsworth wrote that "The possible relation of a reassignment of teachers to protect the constitutional rights of pupils need not be determined when it is speculative." His reasoning for delaying resolution of this issue until extensive hearings on the facts could be held was the result of a process in which he balanced the possible impact on the efficiency of school administration against the constitutional rights of the pupils. The Supreme Court reversed,[4] holding:

There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative nor can we perceive any reason for postponing the hearing . . . these suits had been pending for several years; more than a decade has passed since we directed desegregation of public school facilities "with all deliberate speed. . . ." Delays in desegregating school systems are no longer tolerable.

Those were the words of the Supreme Court, in 1965; yet Judge Haynsworth apparently found that delays in desegregating schools were quite tolerable. This nation cannot afford the promulgation of that kind of view from the highest court in the land.

In a 1967 Virginia school case,[5] Judge Haynsworth again refused to order the school board to assign teachers on a non-racial basis and upheld a so-called "freedom of choice" plan which worked to defeat the *Brown* ruling. His colleague, Judge Sobeloff, was moved to dissent in these words:

The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

The Supreme Court agreed with Judge Sobeloff and reversed the Haynsworth decision.[6] This reversal took place in 1968, just a year ago—indicating that Haynsworth has continued to misunderstand grievously the nature and

[1] *Griffin* v. *County School Board of Prince Edward County*, 322 7.2d 332 (1963).
[2] 377 U.S. 218 (1965).
[3] *Bradley v. School Board of City of Richmond, Va.*, 345 7.2d 310.
[4] 382 U.S. 103.
[5] *Bowmon v. County School Board of Charles City, Va.*, 382 7.2d 326 (1967).
[6] *Sub nom. Green v. School Board of New Kent County*, 391 U.S. 430 (1968).

intent of the Supreme Court's decisions on school segregation right down to the present day. He has, in other words, successfully resisted an education on this most fundamental issue for 15 long years. It would be a travesty now to put him in a position of promulgating his rejected standards from the highest court in the land.

If there has been any progress in Haynsworth's record in school desegregation cases, it has been only from outright subversion of *Brown* to a kind of gruding acceptance which has actnally had the same old effect of delaying the achievement of racial balance in the schools.

In *Newport News, Virginia* v. *Atkins*,[7] Judge Haynsworth joined the majority decision upholding an injnnction against racial discrimination hut specifically and gratuitously noted that *Brown* did not "require . . . mixing of races in any schools."

In a 1960 opinion upholding a school board's rejection of black transfer applications, Haynsworth assumed good faith on the part of the school board in the face of Virginia's avowed policy of "massive resistance" to school desegregation.[8] In 1962, he dissented from a majority decision outlawing a transfer device utilized by a Virginia school board to avoid desegregation.[9] The Supreme Court categorically rejected his position a year later in *Goss* v. *Board of Education*.[10]

In 1963, in the first of a series of Prince Edward County, Virginia school desegregation cases, Haynsworth denied a shift to federal courts of a suit by black parents to reopen the schools closed by Virginia's "massive resistance" policy. It was in this case and those that followed that the impact of his delaying tactics became clear. The children involved had had no schooling for four years and the additional delay, weakening their resolve and that of those whom they represented, was a blessing to the Virginia strategy.

Wheeler v. *Durham*,[11] a 1961 case often cited by Haynsworth supporters as establishing his "pro-civil rights" position, can only be understood in the context of a preceding case, *Franklin* v. *County School Board of Giles County*.[12] In *Franklin*, the Haynsworth court admitted that seven black teachers had been dismissed in violation of their 14th Amendment right to be free from discrimination on the basis of race, but observed that the teachers had an available remedy, for, in the words of the Haynsworth conrt, "The individual plaintiffs are entitled to reemployment in any vacancy which occurs for which they are qualified by certificate or experience." It is interesting to note that eight new teachers, all white, were employed shortly after the black teachers were discharged. The court, then, was willing to allow white teachers to fill vacancies that were created hy racism but would require black teachers to await the workings of the notoriously slow machinery of southern school desegregation to accomplish their reinstatement.

When it became apparent that the outcome of the Durham board policy was complete racial segregation in teaching staffs, the Haynsworth court grudgingly vacated the District Court's judgment insofar as it rejected appellants prayer for an order respecting teacher assignments. The court, however, nullified the effect of this prononncement by refusing to require the "involuntary assignment or reassignment of a teacher." This amounts to the same delaying tactic utilized in the *Franklin* case.

The pattern is clear. Haynsworth would delay integration whenever possible, and only in those cases where great ingenuity could simply find no respectable way to avoid a pro-integration ruling has Haynsworth allowed himself to issue one.

Perhaps the clearest reflection of Haynsworth's judicial philosophy is seen in a group of cases challenging racial segregation in health facilities, where he has stated his views on the obligation of quasi-public facilities to comply with the requirements of the 14th Amendment. Even as other judges on the 4th Circuit Court of Appeals have liheralized their thinking and their voting patterns in civil rights cases, Judge Haynsworth has conspicuously failed to do so. Judge Haynsworth's dogged adherence to constitutional views which are at war with the struggle of black people for their due rights is distressingly well-illustrated in this series of cases challenging segregation in health facilities.

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[7] 246 7.2d 325 (1957).
[8] *Jones v. School Board of the City of Alexandria, Va.*, 278 7.2d 72 (1960).
[9] *Dillard v. School Board of the City of Charlottesville*, 308 7.2d 920 (1962).
[10] 373 U.S. 683 (1963).
[11] 309 F. 2d —— (1961).
[12] 360 F. 2d 325 (1966).

In *Simkins* v. *Moses Cone Memorial Hospital*,[13] a case offered by his admirers as "Haynsworth's only apparent deviation from a steady course of pro-civil rights decisions," he dissented from the majority holding that one section of the Hill-Burton Act of 1964 was unconstitutional because it allowed federal grants to private hospitals which had a policy of excluding black doctors and dentists from their staffs. It is further argued that his narrow construction of state action under the 14th Amendment was "understandable," since in 1963 state action did not have the broad meaning now attributed to it. However, all the other judges on the court labored under the same "narrow meaning" and still managed to find the requisite state action. This is but another instance of a case in which Haynsworth's colleagues applied a more expansive notion of the civil rights laws, while Haynsworth himself remained bound to his parochial and anachronistic views.

In the *Simkins* case, Haynsworth's view was that the facts were not distinguishable from an earlier hospital case in which the court had held that the hospital was a private facility and hence could discriminate against black physicians without violating the 14th Amendment. The court itself retreated from the earlier case in Simkins, relying on *Burton* v. *Wilmington Parking Authority*,[14] which had effectively overruled the earlier hospital case. In 1964, Haynsworth's colleagues on the Circuit Court again accepted the *Burton* doctrine of state action, and Haynsworth belatedly and grudgingly indicated his acquiescence in the decision, while taking pains to point out that he was "unpersuaded" that his earlier views were incorrect. According to Haynsworth, the federal courts had no responsibility to black plaintiffs attempting to vindicate their civil rights, and hospitals which were supposed to provide essential health services to the entire community were at liberty to discriminate between black patients and doctors and white patients and doctors. The concept that public monies cannot be channeled into the hands of those who would discriminate on the basis of race is merely a beginning in the struggle for equality, yet Haynsworth apparently views such a concept as subversive of the judicial process. Such a ruling was to him an action so far removed from the proper scope of judicial action that he could barely bring himself to approve of it, even after it had become firmly established as the law of the land.

While no consistent pattern has emerged from Haynsworth's positions in cases involving the desegregation of other facilities, the same regressive and obstructionist tendencies have come across in a number of cases. In 1959, he voted in favor of the Circuit Court's holding that discrimination practiced by a privately owned restaurant did not contravene the 14th Amendment;[15] in 1958 he joined the court in holding that a state courthouse was under no obligation to remove racial signs on public rest rooms.[16] At other times, Haynsworth joined court opinions which enlarged the scope of the civil rights acts and enjoined discriminatory practices in some areas—but the very fact of his inconsistency shows his insensitivity to the principles involved. It apparently has been easy for him time and again to look for ways to avoid, if not actually subvert, the intent and spirit of Supreme Court decisions and Congressional legislation.

The same attitude appears in a number of cases involving petitions filed by defendants seeking removal of trials from state to federal courts on the grounds that fair trials in the respective state courts would be impossible because of jury discrimination. Haynsworth wrote the majority opinion in three cases denying the removal petitions.[17] Judges Sobeloff and Bell dissented from these decisions, asserting in one that:

The extremely narrow construction which the majority gives to the removal statute comports neither with its historical context, nor its present language, nor with the spirit of those decisions of the Supreme Court which have given new breadth and meaning to the constitutional guaranty of equal rights to all citizens nor with the intent and purposes of the 1964 Civil Rights Act.[18]

In those words, we submit, Judges Bell and Sobeloff captured the essence of Clement Haynsworth: the narrowness of his vision, the pettiness of his outlook,

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[13] 323 F. 2d 959 (1963).
[14] 365 U.S. 715 (1961).
[15] *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (1959); *cf. Slack v. Atlantic White Tower*, 284 F. 2d 746 (1960).
[16] *Dawley v. City of Norfolk*, 260 F. 2d 647 (1958).
[17] *Virginia v. Morris*, 357 F. 2d 107; *Virginia v. Wallace*, 357 F. 2d 105; *Baines v. City of Danville, Virginia*, 357 F. 2d 756.
[18] *Baines v. City of Danville, Virginia*, 357 F. 2d 756.

his fundamentally negative attitude toward the effort to make justice a more meaningful reality in the lives of all Americans. Judge Haynsworth has, throughout his career, stood for obstructionist technique and philosophy, squarely contrary to the whole thrust of modern Supreme Court decisions. His appointment to that body now would make a mockery of the path it has forged over the past fifteen years.

The appointment of a new Supreme Court Justice is a major event in the history of this country. The nine men who sit on that bench should represent the best that we can summon from among us. A solid background in the law itself is obviously a prerequisite for such an appointment, but that is only the first criteria that we should expect these men to meet. An unquestioned integrity in essential, but more than that, a compassion, a breadth of vision, a deep understanding of all the social currents that swirl about our society are absolutely imperative in any appointee if he is to have the confidence of the nation, if he is to live up to the honor and responsibility of his office. The black law students of this country are perhaps more acutely aware than anyone else of the necessity for opening the entire judicial system to the participation of all the people. When so many voices are shouting about the immorality of the legal system, its oppressive nature, its doors that so often remain closed to the poor and the black, that is not the time to elevate to the Supreme Court a man who has used the law as a means of slowing down the progress of the poor and the black, in their effort to gain full entry into American society. When so many American institutions face such searching doubt and cynicism from so many segments of society, that is not the time to elevate to the Supreme Court a man who will command so little respect and confidence from those segments which already feel so alienated from the system. Clement Haynsworth, we submit, has condoned and has himself participated in some of the bleaker chapters of recent judicial history, and as such he stands as a symbol of the continued failure of American society to make good on its promises to all its citizens.

The approval of this appointment will mean that our Senators agree with our President, that the most qualified man we can find to sit in our highest bench is a man who has never stood for progress in human rights. His appointment will ensure disappointment and disenchantment among vast segments of the young, the poor and the black of this country. In an hour that calls out for the appointment of a man who will lend dignity and prestige and an aura of confidence to the court, the nation is offered instead a man whose understanding of and commitment to principles of justices and equality raises serious doubts in many minds. The black law students of this country expect better of you; indeed, the whole country expects better of you. In his famous attack on the Catiline conspiracy in ancient Rome, Cicero asked, "How long, O Cataline, will you go on abusing out patience?" We would paraphrase that question now and present it to you, members of the United States Senate: "How long, O brokers of power, will you go on abusing the patience of those who await the day when 'of the people, by the people, and for the people' is no longer an empty rhetorical phrase." Our patience, Senators, like the patience of your forefathers who dumped tea in the Boston harbor, is not inexhaustible. We urge you to reject this nomination.

Senator ERVIN. Senator Dodd, do you have any questions?

Senator DODD. No.

Senator ERVIN. Senator Hart?

Senator HART. No, Mr. Chairman, but I just want to make the point that twice before, these gentlemen traveled at their expense to attend this hearing, and this is the third time, and whatever one's feeling may be with respect to the position they take on the nominee, this demonstrates a depth of conviction which I think is laudatory. I regret that they have had these several earlier inconveniences, and I am grateful that they would be persistent.

Senator ERVIN. Senator Hruska?

Senator HRUSKA. I have no questions. Thank you, Mr. Chairman.

Senator ERVIN. Re-read the list of those who did not appear.

Mr. HOLLOMAN. Carl J. Megel, American Federation of Teachers, AFL–CIO; Floyd B. McKissick, National Conference of Black Law-

yers; Victor Rabinowitz, National Lawyers Guild; Matthew Guinan, Transportation Workers Union; Henry L. Marsh, Old Dominion Bar Association of Virginia; Julius Chambers, Southeastern Lawyers Association.

Senator HART. Mr. Chairman, it is my understanding that at least some, perhaps all, of the witnesses who have just been called have filed prepared statements.

The CHAIRMAN. They will be filed.

Senator HART. I move that they be made part of the record.

The CHAIRMAN. Yes; they will be made part of the record, and also there are certain witnesses who appeared and filed statements in support of Judge Haynsworth, but who are not in town now, and I would ask that they be made part of the record.

Senator HART. Mr. Chairman, may I offer for the record a statement by Tilford E. Dudley of the United Church of Christ, which statement incorporates a statement of the council, which was adopted on September 20, of the United Church of Christ Council, recommending against confirmation.

The CHAIRMAN. That will be made a part of the record at this point.

(The statement of Tilford E. Dudley follows:)

STATEMENT OF TILFORD E. DUDLEY

I am Tilford E. Dudley, Director of the Washington Office for the Council for Christian Social Action of the United Church of Christ. Our office is at 110 Maryland Ave. N.E., Washington, D.C. 20002.

The United Church of Christ is a relatively new denomination formed several years ago by the merger of the Congregational Christian Churches and the Evangelical and Reformed Church. It has about 7,000 local churches with slightly over 2 million members. The Council for Christian Social Action is an official agency within that church with the responsibility of working to make the implications of the Gospel effective in society. Its 27 members are appointed by the Church instrumentalities.

At its meeting on September 20, 1969, the Council discussed the President's nomination of Judge Clement F. Haynsworth, Jr. to membership on the U.S. Supreme Court. The Council members were concerned over Judge Haynsworth's insensitivity over conflicts and the appearance of conflicts between his personal finances and cases that come before him and also over his philosophical inability to understand and meet the current challenges of society. The discusion culminated in the unanimous adoption of a formal statement which is set forth below.

I should point out that the Council's deliberations were before the revelation—or at least without any knowledge—of Judge Haynsworth's purchase of $16,000 worth of stock in the Brunswick Corp. while that company was involved in litigation before him in his Court. The Council also did not know that the Judge's wife still owns 10 shares of stock in the Chesapeake & Ohio Railroad and that the Judge has sat in several cases involving the C. & O. These additional instances of improper, or at least questionable, conduct would have sharpened the Council's conviction that confirmation of the appointment should be denied. The nominee does not have the qualifications needed for the nation's top judicial authority.

The Council's statement follows:

APPOINTMENT OF JUDGE HAYNSWORTH, A STATEMENT ADOPTED SEPTEMBER 20, 1969, BY THE COUNCIL FOR CHRISTIAN SOCIAL ACTION

The Council for Christian Social Action of the United Church of Christ opposes the confirmation of Judge Clement F. Haynsworth, Jr. as Associate Justice of the United States Supreme Court both because of his demonstrated indifference to conflicts of interest and because of the philosophy revealed by his decisions.

CONFLICTS OF INTEREST

Federal judges are appointed for life and the Constitution further provides that their salaries cannot be reduced during their tenure. Canon 26 of the Code of Judicial Ethics promulgated by the American Bar Association provides: "A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court, and after his accession to the bench, he should not retain such investments previously made longer than a period sufficient to enable him to dispose of them without serious loss."

In 1950, when he was a practicing attorney, Mr. Haynsworth and his partners formed an automatic vending machine company. He became a stockholder, director, and vice president and his wife became the secretary. In 1957 he was appointed to the U.S. Court of Appeals. He retained his holdings but now says he orally resigned as vice president, although the corporation records continued to list him as such for at least five years. His company did a substantial business with the Deering Milliken Company. Early in 1963 his court began an important case involving that company and in November he cast the deciding vote and wrote the opinion favoring the company. The following spring he sold his stock at a profit of $434,710. Later in 1964, the U.S. Supreme Court reversed his decision by a vote of 7 to 0.

Testimony at the current Hearings of the Senate Judiciary Committee shows that Judge Haynsworth now holds more than $24,000 worth of stock in the J. P. Stevens textile firm. He stated at the hearing that he saw nothing wrong in retaining this investment. The Stevens company's labor relations problems, among the most turbulent in the South, have been in and out of the Fourth Circuit Court for many years.

PHILOSOPHY

We believe that the nation is entitled to a Supreme Court familiar with current trends and able to interpret the Constitution so as to meet the new challenges that confront us each day. Judge Haynsworth's record discloses no such ability.

In the long, bitter fight for desegregated schooling in Prince Edward County, Virginia, Judge Haynsworth played an important role. In 1959, he wrote a 2 to 1 decision reversing a Federal Court order against school officials, holding that it was proper to await action by state courts of Virginia.

In 1963, he could find no way for Federal Courts to cope with the county's strategy of closing down public schools and helping private ones operate with tax credits for parents. He wrote:

"When there is a total cessation of the operation of an independent public school system, there is no denial of equal protection of the laws, though the resort of the poor man to an adequate substitute may be more difficult and though the result may be the absence of integrated classrooms in a locality."

The Supreme Court disagreed in 1964, holding that even if Virginia had no duty to operate public schools, it must operate them in Prince Edward if it operated them elsewhere.

We find a similar insensitivity in the area of civil liberties. For example, Judge Haynsworth upheld the conviction of an illiterate Negro, Elmer Davis of Charlotte, North Carolina, when Davis sought habeas corpus relief from a death sentence. He had confessed to a rape-murder after two weeks in police custody. The U.S. Supreme Court reversed the Haynsworth decision by a 7 to 2 majority.

The CHAIRMAN. Gentlemen, this closes the hearings unless Judge Haynsworth is called back.

Thank you gentlemen.

(The statements referred to which were filed for the record follow:)

STATEMENT OF CHARLES ALAN WRIGHT

My name is Charles Alan Wright. I am Charles T. McCormick Professor of Law at The University of Texas. I come to support the nomination of Judge Haynsworth to the Supreme Court.

For more than twenty years my professional specialty has been observing closely, and teaching and writing about, the work of federal courts. From

1950 to 1955 I was a member of the faculty at the University of Minnesota Law School and I have been at The University of Texas since that time. I was a visiting professor at the University of Pennsylvania Law School in 1959–60, at the Harvard Law School in 1964–65, and at the Yale Law School in 1968–69. I regularly teach courses in Federal Courts and in Constitutional Law, a seminar in Federal Courts, and a seminar on the Supreme Court. Since 1964 I have been a member of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States and prior to that time was a member of the Advisory Committee on Civil Rules. I was Reporter for the recently-completed Study of Division of Jurisdiction between State and Federal Courts made by the American Law Institute.

My writings include a seven-volume revision of the Barron and Holtzoff Treatise on Federal Practice and Procedure. That set of books is now being supplanted by a new treatise on the same subject. Publication of the new treatise began in February of this year with my three volumes on criminal practice and procedure, and the first of the volumes on civil litigation, which I am writing in collaboration with Professor Arthur R. Miller, was published in April. In addition I am the author of a one-volume hornbook, *Wright on Federal Courts*, a second edition of which is now at the publisher's, and, in collaboration with two others, am the author of the Fourth Edition of *Cases on Federal Courts*.

With this professional interest, and with these writing commitments, I necessarily study with care all of the decisions of the federal courts, and inevitably form judgments about the personnel of those courts. We are fortunate that federal judges are, on the whole, men of very high caliber and great ability. Among even so able a group, Clement Haynsworth stands out. Long before I ever met him, I had come to admire him from his writings as I had seen them in *Federal Reporter*.

Some of the criticisms of Judge Haynsworth that I have read in the press seem to me to fail to take into account the difference between the role of a Justice of the Supreme Court and that of a judge of an inferior court. In the first place, the nature of the work is different. The Supreme Court today is necessarily a public law Court, with almost all of its time devoted to momentous cases involving the interpretation and application of the Constitution and the statutes of he United States. In a court of appeals, such as the Fourth Circuit, there is much more private litigation, of interest only to the parties in the case, and many more cases of a kind that the Supreme Court rarely reviews, such as the construction of a particular patent, award of compensation in an eminent domain proceeding, the niceties of the Bankruptcy Act, sufficiency of the evidence in a personal injury case, and the meaning of state law in a diversity case. To form a judgment about Judge Haynsworth based only on his opinions in the comparatively few cases in which he has participated that are of the sort he is likely to hear on the Supreme Court is to ignore the vast body of his work and thus to risk forming a mistaken impression of his judicial qualities and of his conception of the role of a judge. To avoid falling into that same error myself, I have gone back in the last several weeks and looked at every opinion in which he has participated, opinions covering a span of 12 years and 167 volumes of *Federal Reporter*.

Second, it must be remembered that the function of a lower court judge is to apply the law as the Supreme Court has announced it, except for those rare instances in which there is solid reason to believe that the Supreme Court itself would no longer adhere to an old decision. He cannot disregard an authoritative Supreme Court precedent no matter how deeply he may feel that the highest tribunal has erred. At the same time, as Learned Hand once observed, he must be slow to embrace "the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant * * *." [*Spector Motor Service* v. *Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (dissenting opinion).] The example of John J. Parker shows what a tragic mistake it can be to suppose that the opinions of a conscientious and law-abiding lower court judge necessarily reflect his own understanding of the Constitution and the laws. Even those who think, as I emphatically do not, that it is proper to assess a judge on the basis of whether the results he has reached are in accord with one's own preferences should be careful, in reviewing the record of a lower court judge, to consider particular results in the context of what the law, as the Supreme Court had announced it, was at the time the case came down.

Let me give one example of the point I have just made. In 1960 Judge Haynsworth joined with Judges Sobeloff and Boreman in a short per curiam opinion. A plaintiff was arguing that state law denying an illegitimate child the right to inherit from his father was a denial of the equal protection of the laws to illegitimate persons. The court said that this argument was "so manifestly without merit" that it did not present a substantial federal question and the federal courts had no jurisdiction. [*Walker* v. *Walker*, 274 F. 2d 425 (4th Cir. 1960).] The decision seems strange, and probably wrong, when read today. In the light of the Supreme Court's decision that it is a denial of equal protection to refuse to allow an illegitimate child to recover for the wrongful death of its mother, the argument made to the Fourth Circuit in 1960 today certainly presents at the least a substantial federal question. But the Supreme Court decision did not come down until 1968 [*Levy* v. *Louisiana*, 391 U.S. 68 (1968)], and it is difficult to criticize lower court judges for failing to anticipate, eight years in advance, a Supreme Court decision that, when it finally came down, was criticized by three members of the Supreme Court as a "constitutional curiosit[y]" achieved only by "brute force." [*Id.* at 76.] I suggest the same point is equally applicable in other areas of the law.

There are judges who have been great essayists. We remember persons such as Justice Cardozo and Judge Learned Hand as much for their contributions to literature as for their contributions to law. Judge Haynsworth is not of this number. Very rarely does he indulge himself in a well-turned epigram or in quotable rhetoric. Instead his opinions are direct and lucid explanations of the process by which he has reached a conclusion. He faces squarely the difficulties a case presents but he resists the temptation to speculate about related matters not necessary to decision. There is one case in which, though affirming a decision, he wrote for more than a page about the "slovenly practices in offices of District Attorneys which come to our attention much too frequently" in connection with the drafting of indictments [*United States* v. *Roberts*, 296 F.2d 198, 201–202 (4th Cir. 1961)], but in this instance he was expressly authorized to speak for all of the judges of the Fourth Circuit, and not merely those on the panel, and the warning he uttered was a useful one in reducing the opportunity for attack in future criminal cases. On reading Judge Haynsworth's opinions I am reminded of Justice Jackson's classic advice to district judges about Judge Learned Hand and his cousin, Judge Augustus Hand. Justice Jackson said: "Always quote Learned and follow Gus." [Quoted in Clark, *Augustus Noble Hand*, 68 HARV.L.REV. 1113, 1114 (1955)]. If Judge Haynsworth's opinions are not quotable, they are easy to follow.

It would be very hard to characterize Judge Haynsworth as a "conservative" or a "liberal"—whatever these terms may mean—because the most striking impression one gets from his writing is of a highly disciplined attempt to apply the law as he understands it, rather than to yield to his own policy preferences. Thus in one case he felt compelled to hold that sovereign immunity barred any relief for a wrong committed by the National Park Service. In doing so, he wrote: "If some of us, appraising the policy considerations, were inclined to assign a more restricted role to the doctrine of sovereign immunity in this area, we could not follow our inclination when the Supreme Court, clearly and currently, is leading us in the other direction." [*Switzerland Co.* v. *Udall*, 337 F. 2d 56, 61 (4th Cir. 1964).] When the Board of Supervisors of Prince Edward County made midnight disbursements of tuition grants so that the money would be gone before the Fourth Circuit had an opportunity to rule on the legality of this action, Judge Haynsworth thought that their conduct was "unconscionable" and "contemptible," but, unlike the majority of his court, he could not find it "contemptuous and punishable as such" since they had violated no court order in distributing the funds. [*Griffith* v. *County School Board of Prince Edward County*, 363 F. 2d 206, 213, 215 (4th Cir. 1966) (dissenting opinion).] Many lawyers would agree.

Judge Haynsworth shows a considerable respect for precedent, and has felt bound by decisions that he thought incorrect [*Eaton* v. *Grubbs*, 329 F. 2d 710, 715 (4th Cir. 1964)], but he insists that precedents be used with discrimination. In his first dissenting opinion he objected that the majority had applied language of other cases out of context and said "at least, if disembodied languages is to be applied to a dissimilar question, it should not be regarded as controlling." [*Cooner* v. *United States*, 276 F. 2d 220, 238 (4th Cir. 1960) (dissenting opinion). See also *United States* v. *Bond*, 279 F. 2d 837, 848 (4th Cir. 1960) (dissenting opinion).]

In a well-known later case he objected to the majority's reliance on the old and discredited rule that law officers may seize contraband or the instrumentalities of a crime but may not seize evidence of the crime, saying that "the language the Supreme Court has employed must be read in the light of what it has held." [*Hayden* v. *Warden, Maryland Penitentiary*, 363 F. 2d 647, 657 (4th Cir. 1966) (separate opinion).] He went on to make the argument that since the standards for use of confessions are being stiffened, the police must rely increasingly on scientific investigation of crime, and that they cannot do this if they are denied access to evidence that may be subjected to scientific analysis. The view he took there was vindicated when the case reached the Supreme Court, and that Court discarded the "mere evidence" rule. [*Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294 (1967).]

In another case he held, contrary to an old Supreme Court decision, that habeas corpus would lie to attack a sentence that the prisoner was to serve in the future. He said: "This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case." [*Rowe* v. *Peyton*, 383 F.2d 709, 714 (4th Cir. 1967).] His prediction that the old case was so eroded that it would no longer be followed was proved accurate when the Supreme Court unanimously affirmed his decision. [*Peyton* v. *Rowe*, 391 U.S. 54 (1968).]

In that same habeas corpus case he showed, as he has throughout his judicial career, an awareness that law is not static and that changing times may require different solutions for problems. He pointed out how the nature of habeas corpus has changed since the Great Writ was first developed and said: "The problem we face simply did not exist in the Seventeenth Century. Now that recently it has arisen, if there is a substantive right crying for a remedy, it seems most inappropriate to approach a solution in terms of a Seventeenth Century technical conception which had no relation to the context in which today's problem arises." [383 F.2d at 713–714.] This has been a consistent theme in Judge Haynsworth's opinions. In his first year on the bench, in a case holding that a medical examiner's certificate showing the percentage of alcohol in a defendant's blood was admissible, he wrote that the Confrontation Clause of the Sixth Amendment was not intended "to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule." [*Kay* v. *United States*, 255 F.2d 476, 480 (4th Cir. 1958). Only last year, in an important opinion for his court adopting a new test of insanity, he emphasized the need for "judicial reassessment of notions too long held uncritically and of a verbal formalism too long parroted." [*United States* v. *Chandler*, 393 F.2d 920, 925 (4th Cir. 1968).

The same respectful but discriminating approach Judge Haynsworth shows in the use of precedents is evident when the problem is one of construing a statute. He does not make a fortress of the dictionary. He insists, instead, on construing statutes in a fashion that will "effectuate the apparent purpose and intention of the Congress" [*Crosse & Blackwell Co.* v. *F.T.C.*, 262 F.2d 600, 605 (4th Cir. 1959), and has refused "to adopt a literal interpretation of this statute without regard to its purpose or the extraordinary result to which it would lead." [*Alvord* v. *C.I.R.*, 277 F.2d 713, 719 (4th Cir. 1960). See also *Baines* v. *City of Danville*, 337 F.2d 579, 593 (4th Cir. 1964), *affirmed*, 384 U.S. 590 (1966).]

Another consistent theme in Judge Haynsworth's writings is his belief that it is not the function of an appelate court to make findings of fact. Both in civil and in criminal cases he shows great faith in the jury system. In an extremely important decision earlier this year he said that "faith in the ability of a jury, selected from a cross-section of the community, to choose wisely among competing rational inferences in the resolution of factual questions lies at the heart of the federal judicial system." [*Wratchford* v. *S. J. Groves & Sons Co.*, 405 F.2d 1061, 1065 (4th Cir. 1969).] This is merely the latest expression of an attitude he has had as long as he has been on the bench. [See, *e.g.*, *Dixon* v. *Virginian Ry. Co.*, 250 F.2d 460, 462 (4th Cir. 1957).] He has been quick to hold that there must be a new trial if there was any possibility that an improper influence might have been brought to bear on the jury. [*Holmes* v. *United States*, 284 F.2d 716 (4th Cir. 1960); *Thomas* v. *Peerless Mattress Co.*, 284 F.2d 721 (4th Cir. 1960); *United States* v. *Rogers*, 289 F.2d 433 (4th Cir. 1961); *United States*

v. *Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964).] Long before the Suppreme Court came to a similar conclusion [*Burton* v. *United States*, 391 U.S. 123 (1968)], he showed a proper skepticism about the efficacy of instructions cautioning a jury that a confession is admissible against one defendant but not against another and called for the routine adoption of practices that would give greater protection to the codefendant. [*Ward* v. *United States*, 288 F.2d 820 (4th cir. 1960).] He has recognized, too, that jurors can be swayed by prejudice, and has held that when Negro defendants were on trial counsel must be given an opportunity to explore whether any members of the jury panel helonged to organizations that might suggest prejudices against Negroes. [*Smith* v. *United States*, 262 F.2d 51 (4th Cir. 1958).]

The jury occupies a significant constitutional role in our system, but even when it is a judge rather than a jury who has found the facts, Judge Haynsworth has thought that great weight should be given to the findings and that the appelate court should not substitute its own view of the facts for that taken by the district judge. [*Hall* v. *Warden, Maryland Penitentary*, 313 F.2d 483, 497 (4th Cir. 1963) (dissenting opinion); *United States* v. *Ellicott*, 336 F.2d 868, 872–874 (4th Cir. 1964) (dissenting opinion).]

Finally, Judge Haynsworth respects the place of the states, and of the state judiciaries, iu our form of government. Indeed he has been reversed by the Supreme Court for deferring too much to the state courts. [*Griffin* v. *Board of Supervisors of Prince Edward County*, 322 F.2d 332 (4th Cir. 1964), *reversed*, 377 U.S. 218 (1964).] At the same time he has insisted on the independence of the federal courts. In an important decision he wrote that a state may not "deny the judicial power the states conferred upon the United States when they ratified the Constitution or thwart its exercise within the limits of congressional authorization." [*Markham* v. *City of Newport News*, 292 F.2d 711, 713 (4th Cir. 1964).] This was in keeping with his voiced "concern for the perpetuation of an independent federal judicial system * * *." [*Wratchford* v. *S. J. Groves & Sons Co.*, 405 F.2d 1061, 1066 (4th Cir. 1969).]

History teaches us that it is folly to suppose that anyone can predict in advance what kind of a record a particular person will make as a Justice of the Supreme Court. The awesome and lonely responsibility that the Justices have in considering the great issues that come before them has made them, in many instances, different men than they were before. All that oue can properly undertake, in assessing a nominee to that Court, is to consider whether he has the intelligence, the ability, the character, the temperament, and the judiciousness that are essential in the important work he will be called upon to perform. Clement Haynsworth has shown in twelve years on the circuit court bench that he possesses all of these qualities in great measure. I hope that he will be quickly confirmed.

Thauk you.

Supplemental Statement of Charles Alan Wright

On September 3d I seut to the Judiciary Committee copies of the prepared text of the testimony I expected to give in the hearing then scheduled for September 9th. The postponement of the hearing because of the regrettable death of Senator Dirksen and the delay in my own appearance hefore the Committee has made it possible for me to give further study to the cases in which Judge Haynsworth has participated and analyze in closer detail his philosophy in particular areas of the law to the extent that this is disclosed by his votes and his opinions. My attention has centered on the areas of criminal procedure and freedom of expression.

I continue to believe, as my original statement indicates, that it is impossible to know in advance what the voting record will be of any appointee to the Supreme Court and that it is especially treacherous to attempt to make such an advance assessment on the basis of what a man has done as a judge of a lower court prior to appointment to the Supreme Court. On many issues the record will be silent simply because the lower court judge has never been confronted with those issues. For one example, the meaning of the Establishment and Free Exercise Clauses of the First Amendment has never, so far as I can find, come up in any case in which Judge Haynsworth has participated. There are other important areas of the law of which this is equally true. Even where a lower court judge has been confronted with a particular issue he has done so as a judge writing within the framework of relevant Supreme Court decisions and not as a free agent.

For these reasons the remarks that follow are a description of the record of Judge Haynsworth. They are not an attempt to predict the record of Justice Haynsworth.

Few, if any, areas of the law are the subject of more controversy today than that of criminal procedure. It is an area of special interest to me because, as I noted in my original statement, earlier this year I published a three-volume treatise on federal criminal procedure. In the Preface to that treatise I said: "I freely confess to one bias. I admire and respect the Supreme Court of the United States." [1 Wright, *Federal Practice and Procedure: Criminal* viii (1968).] It is with that bias that I reviewed the criminal cases in which Judge Haynsworth has participated.

The overall impression that I get from these cases is that of an intensely practical approach to criminal procednre. This approach is hardly surprising in a judge who has expressed in many ways and in many contexts the thought that "Theoretical abstractions are of no help. Our conclusion must be founded upon practical considerations." [*United States* v. *Southern Ry. Co.*, 341 F. 2d 669, 671 (4th Cir. 1956).] Judge Haynsworth has been in the vanguard, often ahead of the Supreme Court, in protecting persons accused of a crime against any tilting of the scales of justice that might lead to the conviction of an innocent man. At the same time he has been reluctant to set free a person who is undoubtedly guilty because of some minor imperfection, saying that this is "too high a price to pay for indulgence of a sentimentalism." [*United States* v. *Slaughter*, 366 F. 2d 833, 847 (4th Cir. 1966) (dissenting opinion).] Let me give illustrations of the cases that have led me to these conclusions.

One area of potential abuse in criminal procedure, in which there is a very real danger of convicting the innocent, is where several defendants are tried at the same time. There is substantial risk that the guilt of one defendant will rub off on another and that the jury will not make an independent evaluation of the evidence against each defendant.

In 1968 the Supreme Court reduced a part of this risk when it ruled that two defendants cannot be tried together if one has made a confession implicating the other unless precautions have been taken to protect the right of confrontation of the defendant who has not confessed. [*Bruton* v. *United States*, 391 U.S. 123 (1968).] Eight years before that decision Judge Haynsworth had written of the need for precautions of this kind and had said that "in the normal case, such a precaution should be taken routinely." [*Ward* v. *United States*, 288 F. 2d 820, 823 (4th Cir. 1960).] Even prior to that case Judge Haynsworth had concurred in one of the leading opinions on joiuder of defendants, *Ingram* v. *United States* [272 F. 2d 567 (4th Cir. 1959).] The holding in *Ingram* is that joinder of defendant is not permissible unless the requirements of the Rules of Criminal Procedure on joinder are satisfied, and that "it is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials.'" [*Id.* at 570–571.] The *Ingram* decision seems to me demonstrably sound and I regret that the Second Circuit, in an opinion by Judge Friendly, has reached a contrary result [*United States* v. *Granello*, 365 F. 2d 990 (2d Cir. 1966). See 1 Wright, Federal Practice and Procedure: Criminal 327–329 (1969).]

The right to a speedy trial is one of the important protections in criminal procedure, secured by the Sixth Amendment. For many years this right had been effectively denied to many defendants because the cases held that a state was under no obligation to try a defendant who was in a federal prison or the prison of another state on some other charge. The Supreme Court announced a different rule earlier this year, in a case in which I had the honor to be appointed by the Court as counsel for the indigent prisoner. [*Smith* v. *Hooey*, 393 U.S. 374 (1969).] It ruled that a state must make a good faith effort to have a defendant confined elsewhere returned for trial on the charges pending in the state. Judge Haynsworth had joined in an opinion a year earlier anticipating the result the Supreme Court was later to reach [*Pitts* v. *North Carolina*, 395 F. 2d 182 (4th Cir. 1968)], and only a few days before the Supreme Court decision he wrote the opinion for an en banc court liberalizing the use of habeaus corpus, despite some serious technical difficulties, in order to provide a remedy for state prisoners who wish to enforce their right to be tried by another state. [*Word* v. *North Carolina*, 406 F. 2d 352 (4th Cir. 1969).]

This term the Supreme Court also put teeth in the requirements of Criminal Rule 11 with regard to guilty please, by holding that the judge must personally address the defendant and determine that the plea is being made voluntarily

and with an understanding of the nature of the charge. [*McCarthy* v. *United States*, 394 U.S. 459 (1969).] This came as no new doctrine in the Fourth Circuit, where the court, speaking through Judge Haynsworth, has long recognized a similar doctrine and held that Rule 11 "requires something more than conclusionary questions phrased in the language of the rule. It contemplates such an inquiry as will develop the underlying facts from which the court will draw its own conclusion." [*United States* v. *Kincaid*, 362 F. 2d 939, 941 (4th Cir. 1966).]

One of the major decisions of the final decision day of the Warren Court was *North Carolina* v. *Pearce* [395 U.S. 711 (1969)], severely restricting the power of a judge to give a defendant who has had a first conviction set aside a more severe sentence after a second conviction on the same charge. The decision there affirmed by the Supreme Court was one in which Judge Haynsworth had joined [*Pearce* v. *North Carolina*, 397 F. 2d 253 (4th Cir. 1968)], and indeed another decision in which he concurred, holding that the same rule applies even when the second sentence is imposed by a jury rather than by a judge [*May* v. *Peyton*, 398 F. 2d 476 (4th Cir. 1968)], speaks to a question on which the Supreme Court is still silent and may well go beyond what the Supreme Court will require.

Judge Haynsworth's concern for the sentencing process is evident in still another case. The usual rule is that an appellate court may not consider the length of a sentence provided that it is within statutory limits. The Senate has passed a bill that would change this rule but to date it remains the rule. It would seem to follow that the length of a sentence within statutory limits may not be challenged collaterally by a motion under 28 U.S.C. § 2255. But the Fourth Circuit, in an opinion in which Judge Haynsworth joined, held that this rule must yield where there are exceptional circumstances, and that there were such circumstances, and § 2255 relief was available, where the judge had given the maximum sentence authorized by statute under the mistaken impression that he had no discretion to give a lesser sentence. [*United States* v. *Lewis*, 392 F.2d 440 (4th Cir. 1968).]

In 1966 the Fourth Circuit, sitting en banc, held unanimously that the method by which the police had had the victim of a crime identify the voice of a suspect was so suggestive that to allow evidence of the identification into evidence was a denial of due process. [*Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966).] That decision was cited approvingly by the Supreme Court a year later [*Stovall* v. *Denno*, 388 U.S. 293, 302 (1967)], and the Court has subsequently set aside a conviction on this ground. [*Foster* v. *California*, 394 U.S. 440 (1969).]

Judge Haynsworth has taken a generous view of the right to bail. Years ago he joined in an opinion holding that "normally bail should be allowed pending appeal, and it is only in an unusual case that denial is justified." [*Rhodes* v. *United States*, 275 F.2d 78, 82 (4th Cir. 1960).] More recently he wrote an opinion holding, over vigorous dissent, that a federal court had properly released Rap Brown on his own recognizance from state custody on an extradition warrant. [*Brown* v. *Fogel*, 387 F.2d 692 (4th Cir. 1967).]

Judge Haynsworth has detected violations of due process both where counsel was not provided an indigent for more than three months after his arrest [*Timmons* v. *Peyton*, 360 F.2d 327 (4th Cir. 1966], and where defendant was brought to trial three and a half hours after indictment and there was insufficient time for appointed counsel to investigate the case. [*Martin* v. *Commonwealth*, 365 F.2d 549 (4th Cir. 1966).] He also voted to grant habeas corpus on the ground that the prosecuting attorney in a state case had had a conflict of interest since at the same time he was prosecuting the defendant he represented the defendant's wife in a divorce proceeding. [*Ganger* v. *Peyton*, 379 F.2d 709 (4th Cir. 1967).]

One of Judge Haynsworth's opinions reverses a criminal conviction because the judge had given an unbalanced version of the "Allen charge"—or "dynamite charge" as it is known in my part of the country. [*United States* v. *Smith*, 353 F.2d 166 (4th Cir. 1965). See also *United States* v. *Rogers*, 289 F.2d 433 (4th Cir. 1961).] The case is particularly interesting because there had been no objection to the charge in the district court, as is normally required for the appellate court to consider the point, but the danger that even the pure "Allen charge" will coerce a divided jury into convicting a person is so great [2 Wright, *Federal Practice and Procedure*: *Criminal* § 902 (1969)] that Judge Haynsworth concluded that a one-sided version of that charge was "plain error" that the appellate court might notice on its own motion.

Senator Tydings has called attention earlier in these hearings to Judge Haynsworth's splendid opinion in *United States* v. *Chandler* [393 F.2d 920 (4th

Cir. (1968)], in which he rejected an antiquated test of mental responsibility and adopted for his circuit a new test more consonant with modern psychiatric knowledge.

There is an interesting passage in one of Judge Haynsworth's earliest opinions in which he wrote: "However compelling our conviction that Call has been guilty of wrongdoing, we may not affirm his conviction as a co-conspirator unless the evidence is reasonably susceptible of the inference that he knew of the conspiracy." [*Call* v. *United States*, 265 F.2d 167, 172 (4th Cir. 1959).] The principle that a defendant may not be convicted because he is a bad man, but only if he committed the crime for which he is indicted, is one of great importance.

Judge Haynsworth has done much to remove shackles on the writ of habeas corpus and to make it freely available to those who claim that they have been denied their constitutional rights. At page 6 of my original statement I have discussed his best known case in this area, *Rowe* v. *Peyton* [383 F.2d 709 (4th Cir. 1967), affirmed 391 U.S. 54 (1968)], in which he correctly anticipated that the Supreme Court would no longer follow its earlier precedent holding that a prisoner in custody under one sentence could not challenge another sentence he was to serve in the future. In his opinion in that case he combines great scholarship with the practical approach that is a major theme in all of his opinions. A formalistic approach to the statutory requirement that a prisoner be "in custody" would harm both the prisoner and the state. "It is to the great interest of the Commonwealth and to the prisoner to have these maters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. Justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia." [383 F.2d at 715.]

But *Rowe* stands far from alone. Judge Haynsworth has written that the statutory requirement that state remedies be exhausted does not bar relief when the state court has decided the identical substantive point in a case involving another prisoner and pursuit of the state remedies, therefore, would be futile. [*Evans* v. *Cunningham*, 335 F2d 491 (4th Cir. 1964).] He has held that petitions by prisoners are not to be read with a hostile eye and that "claims of legal substance should not be forfeited because of a failure to State them with technical precision." [*Coleman* v. *Peyton*, 340 F.2d 603, 604 (4th Cir. 1965).] The district court, on habeas corpus, is not bound by a wholly conclusionary finding by the state court [*Outing* v. *North Carolina*, 344 F.2d 105 (4th Cir. 1965)] nor may it accept the historical facts as found by the state court if the state court had no adequate basis for its findings. [*McCloskey* v. *Barlow*, 349 F.2d 119 (4th Cir. 1965).] In many ways the most interesting of the Haynsworth opinions on habeas corpus, other than the *Rowe* case, *is White* v. *Pepersack* [352 F.2d 470 (4th Cir. 1965).] A state court defendant, charged with first degree murder, had taken the stand and admitted the killing but testified to facts that would, if believed, show that it was not premeditated and that he could be convinced only of some lesser offense. The district court held that defendant's admission was tantamount to a plea of guilty and barred him from seeking habeas corpus on the grounds of an illegal search, an involuntary confession, and use of perjured testimony. The Fourth Circuit held to the contrary. In his opinion for the court, Judge Haynsworth wrote that defendant's testimony was surely not a plea of guilty to first degree murder and pointed out that if the state court had found the defendant guilty of second degree murder and imposed an appropriate sentence defendant himself might well have accepted his punishment as proper. Judge Haynsworth then said:

Extended judicial inquiry, with all of its expense and delay, is the natural product of overconstruction of a defendant's admissions and the imposition of an inappropriate sentence. The flood of postconviction cases in state and federal courts will be stemmed only if justice is made to shine more brightly in the trial courts.

[*Id.* at 473] The decision is reminiscent of an earlier one in which he had criticised slovenly practices in drawing indictments on the part of some United States attorneys and pointed out that the consequence of such practice is "the needless expenditure of much time and effort by [the United States Attorney], by defendants and their counsel and by the courts. Here, as in most situations, much waste could be avoided by an initial exercise of reasonable care." [*United States* v. *Roberts*, 296 F. 2d 198, 202 (4th Cir. 1961).]

It seems to me clear that Judge Haynsworth has clearly shown his unwillingness to tolerate procedures in criminal cases that taint the factfinding process or that cast doubt on the fairness of the proceeding or that unreasonably clog claims of constitutional right. In one case he wrote:

Current astuteness in the protection of individual rights is not at odds with the interests of a society which places high values upon liberty and justice and freedom and fairness. It is the cornerstone of such a society.

[*Smallwood* v. *Warden, Maryland Penitentiary*, 367 F. 2d 945, 952 (4th Cir. 1966) (dissenting opinion).] Judge Haynsworth' whole record on the bench of the court of appeals demonstrates that that remark is not empty rhetoric but a statement of deeply felt conviction.

Some of the rules that the Supreme Court has laid down in criminal cases are not concerned with assuring a correct result or with preserving fairness in the proceeding but are intended to deter practices by those responsible for law enforcement that have been found to be inconsistent with the values of our free society. Judge Haynsworth has not been unmindful of this function of the courts. He had been on the bench barely a year when he joined in an opinion in which the court gave a broad reading to the then-recent decision in *Mallory* v. *United States* [354 U.S. 449 (1957)], and said:

The teaching of the Mallory case is that insistence on strict compliance with Rule 5(a) is necessary to discourage police from the use of third degree methods, and that only in that way will the opportunity and the temptation be denied them. Unnecessarily prolonged detention before bringing the accused to a Commissioner or other judicial officer, to give police opportunity to extract a confession, is odious to our federal criminal jurisprudence * * *. [*Armpriester* v. *United States*, 256 F. 2d 294, 296 (4th Cir. 1958).]

He wrote for his court in holding that the *Miranda* rules apply to custodial questioning even though the defendant was not formally under arrest. A dissenter argued that the majority was giving an overdrawn reading to *Miranda* and that the decision was "indeed a blow to law enforcement." but Judge Haynsworth said: "If the arresting officer's failure to make a formal declaration of arrest were held conclusive to the contrary, the rights afforded by Miranda would be fragile things indeed." [*United States* v. *Pierce*, 297 F 2d 128, 130 (4th Cir. 1968).]

One other case about which Senator Tydings has already commented shows Judge Haynsworth's sensitivity to the role of the courts in deterring improper law enforcement practices. The case is *Lankford* v. *Gelston* [364 F. 2d 197 (4th Cir. 1966)]. The court en banc held unanimously, in a fine opinion by Judge Sobeloff, that an injunction should issue to prevent the Baltimore police from making blanket searches on uncorroborated anonymous tips. Most of the homes searched were occupied by Negroes. The court took note of the deteriorating relations between the Negro community and the police in Baltimore and said that "it is of the highest importance to community morale that the courts shall give firm and effective reassurance, especially to those who feel that they have been harassed by reason of their color or their poverty." The court took note of the serious problems of law enforcement, but it said:

Law observance by the police cannot be divorced from law enforcement. When official conduct feeds a sense of injustice, raises barriers between the department and segments of the community, and breeds disrespect for the law, the difficulties of law enforcement are multiplied. [*Id.* at 204.]

I spoke at the outset of the very practical approach Judge Haynsworth takes to problems of criminal procedure. Law enforcement is a deadly serious matter and of great importance to all parts of society. It is not a game in which the police are to be called "out" for failure to touch every base.

The *Hayden* case, discussed at page 6 of my original statement, illustrates this. There Judge Haynsworth indicated his disagreement with the majority of the court in its adherence to the old rule that "mere evidence" may not be the object of a lawful search, and the Supreme Court, in reversing the decision, agreed with him. [*Hayden* v. *Warden, Maryland Penitentiary*, 363 F. 2d 647, 657–658 (4th Cir. 1966) (separate opinion), reversed 387 U.S. 294 (1967).] The "mere evidence" rule was an outdated relic of a former era. It stemmed from property law conceptions about search and seizure while today the Fourth Amendment is recognized as protecting an interest in privacy rather than interests in property. As a practical matter, the rule was a needless hobble on the polic while at the same time it gave no substantial protection to the right of the people to be secure from unreasonable searches. Police could, and did, seize much evi-

dence on the ground that it was a fruit of the crime, or contraband, or an instrumentality of crime, and thus properly the subject of a search. Only occasionally did a criminal defendant receive an unexpected windfall when a court was unable to bring particular evidence into one of these categories and was forced to exclude it. [See 3 Wright, *Federal Practice and Procedure: Criminal* § 664 (1969).] The rule had no reason for existence today and Judge Haynsworth was right, as the Supreme Court held, in believing that the time had come to discard it.

The practicality of his approach is evident also in a dissent he wrote in a case in which the majority held that a confession was involuntary. [*Smallwood* v. *Warden, Maryland Penitentiary*, 367 F.2d 945 (4th Cir. 1966).] Judge Haynsworth thought that the circumstances in the case were far milder than in any case in which the Supreme Court had found a confession involuntary, but his principal argument was that it was pointless to test a 1953 confession by 1966 standards. The practices the police followed were practices that the Supreme Court in 1953, and for some years thereafter, approved. The police at that time could not have anticipated the change in standards that was later to evolve. Nor would setting the prisoner free in 1966 assist the police today in understanding their duty. The later Supreme Court decisions, and *Miranda* in particular, inform the police more authoritatively than would a decision of the Fourth Circuit. All of these considerations led Judge Haynsworth to say:

> It is not fair to the states or to the public to vacate judgments as old as this one on the basis of evolving constitutional standards which could not have been reasonably anticipated by the police at the time they acted.

[*Id.* at 952.] His view did not prevail in that case, but even those of us who welcome most enthusiastically the developments of the last decade in the law of confessions must concede that there is much more to Judge Haynsworth's position.

In appraising his decisions in confession cases, it is necessary to keep in mind the point that I developed at pages 7–9 of my original statement about Judge Haynsworth's reluctance to substitute his view of the facts for those of a jury or a district judge. This is a consistent thread in his confession opinions. It appears perhaps most clearly in a decision he wrote in 1967 upholding a determination that a confession was voluntary. [*Outing* v. *North Carolina*, 383 F.2d 892 (4th Cir. 1967).] The case was obviously a close one. Judge Kaufman wrote a 26 page dissent, but the Supreme Court, unanimously so far as it appears, refused to review the case. [390 U.S. 997 (1968).] Judge Haynsworth said that if the district judge had drawn an ultimate inference that the confession was coerced the court might well have sustained him. But the district judge found that the confession was not coerced and this finding was neither clearly erroneous as an inference of fact not influenced by an erroneous view of law. Since this ultimate inference was a permissible one, the majority of the court felt that it should accept it. I think that here, as in other areas of the law, Judge Haynsworth shares an attitude expressed by Judge Chase, of the Second Circuit, some years ago when he said: "Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." [*Orvis* v. *Higgins*, 180 F.2d 537, 542, (2d Cir. 1950) (dissenting opinion).] Since this has been for many years my own view [see Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957)], I cannot find in it any ground for criticism of Judge Haynsworth or for believing that he is tolerant of coercive police practices.

In conclusion, I would like to turn away from criminal law and address myself briefly to the vitally important freedoms of expression protected by the First Amendment. I am one of those who believe that these have a "preferred position" in our constitutional scheme and that they are of special significance at a time when many groups in our country are unhappy with the established order and wish to air their grievances. Judge Haynsworth has had very little occasion to address himself to the issues these freedoms pose and the decisions are too few to form any solid judgments.

I can find only eight cases involving any significant question of freedom of expression in which Judge Haynsworth has participated. Four of these are obscenity cases, a class of litigation that is perhaps sui generis, and that is not only immensely difficult in itself but is even more difficult for a lower court judge to try to understand the rules, such as they are, that the Supreme Court has laid down. In two cases he wrote for a unanimous court holding particular magazines obscene and was reversed by the Supreme Court. [*United States* v. 392

Copies of Magazine Entitled "Exclusive," 373 F. 2d 633 (4th Cir. 1967), reversed 389 U.S. 50 (1967); *United States* v. *Potomac News Co.*, 373 F. 2d 635 (4th Cir. 1967), reversed 389 U.S. 47 (1967).] The reversals in each instance were per curiam decisions in which the Supreme Court relied on its Delphic opinion in *Redrup* v. *New York* [386 U.S. 767 (1967)], which came down after Judge Haynsworth's decisions. In a third case he was part of a 5–2 majority of the Fourth Circuit holding that obscenity cannot be determined on a per se basis that any collection of photographs of nudes is obscene if, in some of the pictures, the pubic area is exposed. [*United States* v. *Central Magazine Sales, Ltd.*, 381 F. 2d 821 (4th Cir. 1967).] Finally he joined in a 2–1 decision that if material has been found by the district court not to be obscene, it should be admitted through customs and its release should not be held up pending appeal. [*United States* v. *Reliable Sales Co.*, 376 F. 2d 803 (4th Cir. 1967).]

The other four cases are of more general importance. Judge Haynsworth was a member of a three-judge district court that held unconstitutional on grounds of vagueness a North Carolina statute limiting the kinds of persons who may speak on state university campuses. [*Dickson* v. *Sitterson*, 280 F. Supp. 486 (M.D.N.C. 1968).] Professor Van Alstyne, who is to testify in support of Judge Haynsworth, appeared in the case as amicus curiae and is the leading expert in the country on that particular field of the law. He is better qualified than I am to tell you of the significance of the decision. Judge Haynsworth was a member of a panel of his court upholding suspension of students at Bluefield State College for taking part in a disruptive demonstration. [*Barker* v. *Hardway*, 399 F. 2d 638 (4th Cir. 1969).] The Supreme Court refused to review the decision. Justice Fortas, who had been spokesman for the Court one week before in the *Tinker* case [*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969)], in which it was held that school students cannot be disciplined for wearing black arm bands to express their disapproval of the Vietnam war, wrote an opinion concurring in denial of certiorari in the Bluefield State case. He said that "the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker*." [*Barker* v. *Hardway*, 394 U.S. 905 (1969) (concurring opinion).]

In *United Steelworkers of America* v. *Bagwell* [383 F. 2d 492 (4th Cir. 1967)], Judge Haynsworth wrote the opinion holding unconstitutional a city ordinance prohibiting distribution of circulars about union membership without a prior permit from the chief of police. The decision on the merits is unexceptionable. The path was clearly marked by Supreme Court precedents. What is more interesting is the enthusiastic acceptance the court gave to the principle of *Dombrowski* v. *Pfister* [380 U.S. 479 (1965)] that in some cases in which First Amendment rights are involved the usual rules barring a federal court from interfering with a state's enforcement of its criminal laws no longer apply. One like myself who has doubts about whether the protection *Dombrowski* gives to cherished First Amendment rights is not outweighed by its cost in federal-state relations must note with interest Judge Haynsworth's willingness to apply, if not indeed to extend, *Dombrowski*.

Indeed Judge Haynsworth may have partially anticipated *Dombrowski* in a well-known case arising out of demonstrations by Negroes in Danville, Va. The case is a complicated one, involving a number of different issues, and several different appeals disposed of under a single title. Many demonstrators were arrested in Danville for violation of a state court injunction and local ordinances. Some of these persons attempted to remove their cases to federal court. Others went directly to federal court and sought to enjoin the pending state court prosecutions as well as future arrests. The case, which produced one per curiam opinion and two opinions by Judge Haynsworth for the majority of the Fourth Circuit, established four things. First, the court held that the Anti-Injunction Act of 1793, 28 U.S.C. § 2283, did not bar it from issuing a temporary injunction restraining state court prosecutions in order to preserve the status quo while it determined whether grant of a permanent injunction would fall under any of the exceptions to the Act. [*Baines* v. *City of Danville*, 321 F. 2d 643 (4th Cir. 1963); *Baines* v. *City of Danville*, 337 F. 2d 579, 593–594 (4th Cir. 1964).]

This was a creative interpretation of the Anti-Injunction Act and is surely sound. [See American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 307 (Official Draft 1969).] Second, the court held that the circumstances did not permit removal of a criminal prosecution from state to federal court under 28 U.S.C. § 1443, which allows removal of certain

civil rights cases. [*Baines* v. *City of Danville*, 357 F. 2d 756 (4th Cir. 1966).] This holding was affirmed by the Supreme Court. [*Baines* v. *City of Danville*, 384 U.S. 590 (1966).] Third, the court held that the Civil Rights Act, 42 U.S.C. § 1983, does not expressly authorize a stay of state proceedings and that the Anti-Injunction Act therefore barred an injunction against prosecutions already pending in the state court. [*Baines* v. *City of Danville*, 337 F. 2d 579, 586–594 (4th Cir. 1964).] The Supreme Court denied certiorari on this aspect of the case [*Chase* v. *McCain*, 381 U.S. 939 (1965)], and the question remains an open one in the Supreme Court. [See *Cameron* v. *Johnson*, 390 U.S. 611, 613 n. 3 (1968).] Finally, and most importantly for present purposes, Judge Haynsworth held that the rule of comity by which federal courts do not ordinarily interfere with the states in the enforcement of their criminal laws is not absolute, and that the district judge should enjoin further arrests under the ordinances and the injunction "if he finds that in combination they have been applied so sweepingly as to leave no reasonable room for reasonable protest, speech and assemblies, and thus, in application, are plainly unconstitutional." [*Baines* v. *City of Danville*, 337 F. 2d 579, 594–596 (4th Cir. 1964).] *Dombrowski* demonstrates that Judge Haynsworth was right in going that far in allowing the federal court to give relief, although under *Dombrowski* a federal injunction against future prosecutions is also permitted if the challenged laws are unconstitutional on their face.

There is a passage in one of these opinions in which Judge Haynsworth speaks to the meaning of the First Amendment.

"Whatever constitutional basis there may be for the substantive demands of the demonstrators, they have, unquestionably, rights of free speech and assembly guaranteed by the First Amendment, and recognition of those First Amendment rights is required of Danville by the Fourteenth Amendment. Those First Amendment rights incorporated into the Fourteenth Amendment, however, are not a license to trample upon the rights of others. They must be exercised responsibly and without depriving others of their rights, the enjoyment of which is equally as precious. It is thus plain, for instance, that while Negroes, excluded because of their race from a privately operated theater, have a right to protest their exclusion and to inform the public and public officials of their grievance, they do not have the right, by massive occupancy of approaches to the theater, to exclude everyone else from it, or to coerce acceptance of their demands through violence or threats of violence.

"It is well established that public officials, charged with the duty of maintaining law and order, may enforce laws and injunctions reasonably necessary for that purpose, but injunctions and statutes which exceed the necessities of the situation cannot be lawfully enforced if they infringe upon constitutional rights. What is required is mutual accommodation of the rights of the public and those rights of protestants which are guaranteed by the First Amendment. [*Id.* at 586–587.] Later Supreme Court decisions, notably Justice Goldberg's opinion for the Court in *Cox* v. *Louisiana* [379 U.S. 536, 554–555 (1965)], demonstrate that the quoted passage from Judge Haynsworth's opinion represents sound First Amendment philosophy.

The record of the nominee on freedom of expression is scantier than his record on criminal procedure but from his decisions in that area of the law there is no reason to doubt his devotion to the great protections of the First Amendment.

I end as I began. I cannot predict the votes of Justice Haynsworth. The cases I have reviewed in this statement demonstrate, I believe, that in the areas of criminal procedure and freedom of expression the record of Judge Haynsworth on the Fourth Circuit has been a constructive and forward-looking one. But I support his nomination, not because his views on these subjects or others are similar to mine, but because his overall record shows him to have the ability, character, temperament, and judiciousness that are needed to be an outstanding Justice of the United States Supreme Court.

Thank you.

STATEMENT BY G. W. FOSTER, JR. IN SUPPORT OF THE NOMINATION OF JUDGE CLEMENT F. HAYNSWORTH, JR. TO THE SUPREME COURT OF THE UNITED STATES

I am G. W. FOSTER, Jr. Since 1952 I have taught at the Law School of the University of Wisconsin, have been a full professor there since 1959 and an Associate Dean of the Law School for a period of approximately a month. Still earlier I served as an administrative aide to the then Secretary of State, Dean Acheson.

Before that I was the Legislative Assistant to the late United States Senator Francis J. Myers (D–Pa.), at that time the Whip of the Senate.

By faith I am a liberal Democrat and while Judge Haynsworth would not have been my first preference in filling the existing vacancy on the Supreme Court, I am convinced that it is both wrong and unfair to charge that he is a racial segregationist or that his judicial record shows him to be out of step with the Warren Court on racial questions. I now support his nomination unreservedly.

Judge Haynsworth is not a segregationist nor is he out of step with judges whose fidelity to the directions of the Warren Court is unquestioned, and on this point I believe I have some special competence to speak. For more than a decade much of my time has been taken by problems of school segregation. Particularly between the years 1958 and 1966 I came to know a number of federal judges across the South as I studied the impact of school cases on the courts in that region. From early 1961 until I went to Europe for the year in 1963–1964 I served as a consultant on problems of school segregation to the United States Commission on Civil Rights. On my return in 1964 I became a consultant, again on problems of school segregation, to the United States Office of Education and retained that role until returning to Europe in 1967. For better or worse I am probably as much or more responsible than anyone else for the original HEW School Desegregation Guidelines that first appeared in April 1965. [1]

In the area of racially sensitive cases I have followed closely the work of the federal courts in the South over the entire span of time Judge Haynsworth has been on the Court of Appeals for the Fourth Circuit. I have thought of his work, not as that of a segregationist-inclined judge, but as that of an intelligent, open-minded man with a practical knack for seeking workable answers to hard questions. Here and there, to be sure, were cases I probably would have decided another way. I am not aware, however, of a single opinion associated with Judge Haynsworth that could not be sustained by a reasonable man.

Any description of judicial implementation of *Brown* v. *Board of Education* involves a moving picture. Every judge worth his salt who has devoted any substantial time to wrestling with problems of school desegregation has changed views he earlier held. The reasons are straightforward: Remedies thought workable when ordered by the court turned out in practice to be partially, sometimes entirely, unworkable either because they were circumvented by school authorities or had encountered obstacles not forseen. Again, there remain to this day questions not resolved as to the final scope of the Brown mandate: even now I know no one bold enough to attempt a final definition of what constitutes a "racially nondiscriminatory" public school system.[2]

FACULTY AND STAFF INTEGRATION

Thus an assessment of a judge's views on school segregation must be made in the context of the time in which he spoke. Said another way, he must be judged by comparison with other judges facing the same problems with respect to the particular forthcoming school year to which the answers were to be applied. The reason is simply that from school year to school year the picture changed—and rules and priorities applied for one year were modified or abandoned for the next.

I can—albeit quite unfairly—take the views held earlier by any of the small number of federal Judges whose views on racial matters make them front runners among their fellows and compare earlier positions with ones held later by themselves or the Supreme Court and thereby "prove" them "wrong" and out of step with the Supreme Court. Judge Haynsworth is not among that very small front-runner group but he is no foot-dragging, entrenched segrega-

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[1] A detailed account of the evolution of the HEW Desegregation Guidelines appears in Orfield, The Reconstruction of Southern Education (John Wiley & Sons, 1969), pp. 76–101.

[2] In *Brown* II, the Court remanded the cases to the District Court with instructions, among others, "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties in these cases." 349 U.S. 294, 301 (1955). Nowhere else until its decisions in the group of cases including *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968), did the Court provide any clearer definition of the end product intended by *Brown*. In *Green*, however, the Court held that where racially dual schools had previously been operated the end product must be "just schools," not a system still having "white" schools and "Negro" schools, and school boards had a constitutional duty to take meanful steps leading to a "unitary, non-racial system." 391 U.S. 430, 439–442 (1968).

tionist, either. In my judgment he ranks along with the best of the open-minded, pragmatic judges in the federal system, neither dogmatic nor doctrinaire.

To buttress the conclusion just stated, I intend to review in a different light the cases that have been cited to the Committee on the Judiciary as evidence that Judge Haynsworth cannot be trusted to respond fairly to cases involving racial problems. These will be treated under three headings: (1) Faculty and Staff Integratio; (2) The "Minority Transfer" Rule; and (3) the "Racially Nondiscriminatory" School System.

Much has been made of the point that the Supreme Court's per curiam reversal of Judge Haynsworth's opinion in the *Bradley* case[3] proves how far he was out of line with the Supreme Court's thinking. I would like, if I may, to put the faculty integration question in a broader context.

The South's dual schools traditionally had distinctive sets of black and white teachers. The administrative staffs within each school followed a comparable pattern. Yet the school cases before the federal courts during the 1950's focused primarily upon pupil desegregation and apart from some scattered instances in the Border States the school plaintiffs did not assign any important priority to teacher and staff integration.

By the early 1960's, however, complaints filed on behalf of pupils and parents were including demands for faculty integration. Even in this period, plaintiffs generally assigned higher priorities to student integration and as a rule did not press hard either to build a record showing discriminatory faculty assignments nor ask for orders to break up discriminatory faculty patterns. What I intend to do here is summarize developments in the various circuits down through the standards they applied to faculty segregation for the 1965–1966 school year, the year the Fourth Circuit was considering when Judge Haynsworth wrote the *Bradley* decision.

What happened in the Fifth Circuit down to 1965 is typical. On July 24, 1962, a panel consisting of Judges Rives, Tuttle and Brown reversed a District Court order in the Escambia County, Florida, case which had struck from the complaint a claim that discrimiuatory assignment of faculty resulted in harm to pupils; this point should not have been resolved at the pleading stage, the pauel held, but only after a hearing on the question.[4] A few weeks later then District Judge Bryan Simpson ordered school authorities in Duval County, Florida, to submit plans prior to the end of October 1962 for assigning teachers without regard to race.[5] From the coutext of Judge Simpson's order it was clear that no change earlier than the 1963–1964 school year was intended. Things were further delayed while Duval County took an appeal and not until January 10, 1964, did the Fifth Circuit rule on the case. Chief Judge Tuttle's opinion[6]—by this time looking forward to the 1964–1965 school year—held that pupil objections to racial assignment of teachers and staff was a proper concern for the court, adding that the question of teacher assignment could either be postponed[7] or at the discretion of the trial court brought on for hearing as Judge Simpson had done.

This brings us now to the Fifth Circuit's views respecting faculty segregation for the 1965–1966 school year, the year under consideration when the Fourth Circuit decided the *Bradley* case. On February 24, 1965—approximately six weeks before the *Bradley* decision was announced—a panel which included Chief Judge Tuttle reaffirmed the view that the District Court had discretion to postpone consideration of faculty integration (but adding that the court was not precluded from taking up the question).[8] On July 2, 1965—roughly two months after the *Bradley* decision was announced—another panel of the Fifth, also considering plans for the 1965–1966 school year, reversed an order of the Dis-

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[3] *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (Nov. 15, 1965), reversing 345 F. 2d 310 and the companion case, *Gilliam* v. *School Board of the City of Hopewell*, 345 F. 2d 325 (CA 4, April 7, 1965).

[4] *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (CA 5, 1962).

[5] *Braxton* v. *Board of Public Instruction of Duval, County.* ——— F. Supp. ——— (S.D. Fla, August 21, 1962); also reported at 7 Race Relations Law Reporter 675

[6] *Board of Public Instruction of Duval County, Florida* v. *Braxton*, 326 F. 2d 616 (CA 4, January 10, 1964).

[7] Judge Tuttle cited *Calhoun* v. *Latimer*, 321 F. 2d 302 (CA 5, 1963), holding that it was not error for the District Court to postpone consideration of teacher assignment in the Atlanta system. See *Braxton*, n. 6, *supra*, at 620.

[8] *Lockett* v. *Board of Education of Muscogee County Sch. Dist., Ga.*, 342 F. 2d 225, 229 (CA 5, 1965).

trict Court which denied standing to pupils challenging faculty segregation but set no priorities for handling the question on remand. This opinion—in the *Price* case out of Texas—was written by now Chief Judge John Brown, who indicated the question of faculty segregation was best left to the District Court "for consideration by and with the Board as the imported HEW standards are applied." [9]

The reference to the "imported HEW standards" calls for explanation. Near the end of April 1965 the U.S. Department of Health, Education and Welfare issued the "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools," a document widely known thereafter as the HEW Guidelines.[10] Broadly, the Guidelines required all desegregation plans to contain provisions for ultimate faculty and staff desegregation [11] but for the 1965–1966 school year a district was "normally" expected to do no more in this direction than arrange for joint faculty meetings and joint inservice programs.[12] Some not-normal districts, as the Guidelines perceived 1965–1966, would be relieved of even this much joint faculty and staff activity. The position of the Guidelines restated what we understood the prevailing judicial doctrine of the day to be: faculty desegregation was ultimately to be in the picture but a good bit of discretion was to be retained for decision in individual cases when to bring it on.[13]

Summarizing the position of the Fifth Circuit with respect to the 1965–1966 school year—views expressed both before and after Judge Haynsworth's decision in *Bradley*—faculty and staff integration was part of the job to be done but its timing was to be left largely to the discretion of the District Court (which should also take account of the directives in the HEW Gnidelines). And the Fifth Circuit views toward the 1965–1966 school year were either written or concurred in by such men as Judge John Brown and Chief Judge Elbert Tuttle.

Developments in the Sixth Circuit on the faculty desegregation front down to the 1965–1966 school year paralleled closely those in the Fifth, just described. In an early phase of the Chattanooga case, the District Court had struck from the complaint a demand by pupils for faculty desegregation and on July 8, 1963, the Sixth Circuit reversed, restoring the issue to the complaint and leaving it to the discretion of the trial court to determine when to bring the issue on for consideration.[14] A year later, looking into the forthcoming 1964–1965 school year while

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[9] *Price* v. *Denison Independent School District Bd. of Ed.*, 348 F. 2d 1010, 1014–1015 (CA 5, 1965).

[10] The HEW Guidelines for 1965–1966 are reproduced at 30 Fed Register 9981 (Aug. 14, 1965). They may also be seen as an appendix to the Price case cited in n. 9, *supra*, and a copy is attached as an appendix to this statement.

[11] *Guidelines* v. *Methods of Compliance—Plans for Desegregation of School Systems:* B. Requirements Which All Desegregation Plans Must Satisfy—

1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:

a. *Initial assignment.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class with a school of teachers, administrators or other employees who serve pupils.

b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the schools resulting from prior assignments based on race, color, or national origin (see E4b below).

[12] *Guidelines,* V. Methods of Compliance—Plans for Desegregation of School Systems: E. Rate of Desegregation—

4. Every school system beginning desegregation must provide for a substantial good faith start on desegregation starting with the 1965–1966 school year, in light of the 1967 target date.

a. Such a good faith start shall normally require provision in the plan that:

. . . (6) Steps will be taken for the desegregation of faculty, at least including such actions as joint faculty meeting and joint inservice programs.

b. In exceptional cases the Commissioner may, for good cause shown, accept plans which provide for desegregation of fewer or other grades or defer other provisions set out in 4a above for the 1965–1966 school year, provided that desegregation for the 1965–1966 school year shall extend to at least two grades, including the first grade, and provided that the school districts, in such case, shall take into account the steps which would be required to meet the 1967 target date.

[13] In an article published in Saturday Review on March 20, 1965, and upon which the HEW Guidelines rested heavily I thus indicated our then understandings about teacher and staff desegregation: "Desegregation of teachers and professional staffs is ultimately in the picture. . . The problem is one which every district must face and start working on. Every desegregation plan should reveal awareness of the problem and provide assurance that steps will be taken to remove racial discrimination in assignment of teaching personnel. Foster, *Title VI: Southern Education Faces the Facts,* Saturday Review, March 20, 1965, 60, 77.

[14] *Mapp* v. *Board of Education of City of Chattanooga, Tenn.*, 319 F. 2d 571, 576 (CA 6, 1963).

reviewing the Memphis case, the Sixth quoted with approval the view adopted a year earlier in the Chattanooga case that the question of faculty segregation was a proper one to be considered but was an issue left to the discretion of the District Court as to timing.[15] A year later, assessing the Sixth Circuit position on the faculty integration question, District Judge Bailey Brown concluded shortly before the 1965–1966 school year commenced that the timing of the question was still left to the discretion of the trial court.[16]

The faculty segregation question came before the Eighth Circuit only in connection with the 1965–1966 school year and in the context of a case out of Fort Smith, Arkansas. A unanimous panel of the Eighth affirmed the discretion of the District Court in postponing the question and went on to limit the standing to challenge faculty segregation to pupils attending grades already desegregated under the plan.[17] Shortly after reversing the Fourth Circuit on the faculty segregation question in the *Bradley* case, the Supreme Court reversed the Eighth for its holding on the same question.[18]

The views of the Fourth Circuit down through the 1965–1966 school year remain to be accounted for. Developments in the Fourth paralleled those in the Fifth and Sixth Circuits and its views for 1965–1966 were somewhat broader than those just described for the Eighth Circuit. On June 29, 1963, Judge Sobeloff announced for himself and Judge Haynsworth an opinion involving an appeal from Lynchburg, Virginia. (Judge Soper had heard argument in the case but died prior to participating in the Court's opinion.) In reversing and remanding the case to the District Court the Sobeloff-Haynsworth panel held that the complaint had raised the question of faculty and staff desegregation and that the issue was appropriate to the establishment of a racially non-discriminatory school system.[19] (For those who suggest Judge Haynsworth has gone along on new developments only where no other recourse was available to him, it is worth noting that he joined Judge Sobeloff on a point apparently new for the Fourth Circuit and reached by the two of them without reference to other authority on the point.)

By now looking into the 1965–1966 school year, the Fourth sitting en banc announced unanimously, with Judge Haynsworth participating, that the complaints as amended raised the faculty segregation question and that the plaintiffs had standing press the issue against school authorities in Prince Edward and Surrey Counties in Virginia.[20] This decision came December 2, 1964, about four months prior to the en banc decision in *Bradley*[21] and the companion cases decided with it.[22]

The *Bradley* case was argued in the Fourth Circuit on October 5, 1964, and the companion cases involving Hopewell, Virginia, and Buncombe County, North Carolina, were argued November 5, 1964. All three were heard by the Fourth sitting en banc and the opinions on the three were announced together April 7, 1965. In each Judge Haynsworth wrote for the Court and as to each Judges Sobeloff and Bell joined in a partial dissent.

The point of difference between the majority and minority on the question of faculty integration was comparatively a narrow one. All the en banc Court agreed that pupils had standing to challenge faculty and staff segregation, a view which was shared by the Fifth, Sixth and Eighth Circuits at this point in time. Judge Haynsworth's opinion followed the view then current in the other Circuits that the timing for bringing on faculty integration was to be left to the discretion of the District Court and it was on the question of timing that the Sobeloff-Bell dissent parted company, not only with Judge Haynsworth but with the views of the other three Circuits as well.[23] Occupying new ground, the dissenters insisted that evidentiary hearings on faculty segregation should be brought on at once

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[15] *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 667 (CA 6, 1964).

[16] *Monroe* v. *Board of Commissioners, City of Jackson*, 244 F. Supp. 353 (W.D. Tenn., 1965).

[17] *Rogers* v. *Paul*, 345 F. 2d 117, 125 (CA 8, 1965).

[18] *Rogers* v. *Paul*, 382 U.S. 198, 200 (Dec. 6, 1965).

[19] *Jackson* v. *School Board of City of Lynchburg, Virginia*, 321 F. 2d 210, 233 (CA 4, 1963).

[20] *Griffin* v. *Board of Supervisors of Prince Edward County* 339 F. 2d 487 (CA 4, 1964).

[21] *Bradley* v. *School Board of City of Richmond, Virginia*, 345 F. 2d 310 (1965).

[22] *Gilliam* v. *School Board of City of Hopewell, Virginia*, 345 F. 2d 325 (1965); *Bowditch* v. *Buncombe County Board of Education*, 345 F. 2d 329 (CA 4, 1965).

[23] Bradley, note 21, supra, at 320.

and, secondly, that following such a hearing the District Court should have only limited discretion thereafter to delay faculty integration.[24]

By the time the *Bradley* case came before the Supreme Court for review, yet another school year—1966–1967—was in the offing and in a terse per curiam announced November 15, 1965, *Bradley* was reversed on the question of timing the evidentiary hearing on faculty segregation: the Court saw no justification at this point in time for further postponement of evidentiary hearings.[25] The Court did not speak to the second point raised in the Sobeloff-Bell dissent—the priority of timing faculty integration once an evidentiary record showed segregated patterns to exist—and not until the *Montgomery* case in the Spring of 1969 did the Court speak to the substantive content of plans for famulty integration.[26]

The real significance of the Supreme Court's decision in *Bradley* is not that it establishes Judge Haynsworth as a foot-dragging segregationist unable to keep step with the currents of the Warren Court. This conclusion can be reached only by saying that the same decision also tars the image of other highly respected judges and ones clearly liberal on racial questions who were announcing positions similar to Judge Haynsworth's at the very time the Fourth Circuit opinion in Bradley was written. And that just simply will not do.

Moreover, the real significance of *Bradley* is that it represented the commitment of the Supreme Court to the proposition that faculty integration was part of the school desegration picture. Despite the unanimity that the Circuits had reached in concluding that pupils could challenge faculty segregation, there was continued insistence from school authorities that this point did not have the support of the Supreme Court. The Supreme Court's decision in *Bradley*—and its per curiam decision shortly afterwards reversing the Eighth Circuit's ruling iu the Fort Smith case [27] supplied the support for faculty integration. And iu supplying that support the Court had speeded the process for the forthcoming 1966–1967 school year by ordering prompt evidentiary hearings on the question of faculty segregation. Moreover, the Court left for the future the question of timing steps toward faculty integration although the Sobeloff-Bell dissent had suggested an answer on that issue, too.

THE "MINORITY TRANSFER" RULE

On September 17, 1962, the Fourth Circuit sitting en banc announced through a per curiam decision that the "racial minority" transfer provision in the school plan for Charlottesville, Virginia, was unconstitutional because its purpose and effect were to retard desegregation.[28] There were two dissents, one of them from Judge Haynsworth. Almost niue months later, on June 3, 1963, a unanimous Supreme Court invalidated a like minority transfer provision in reviewing two cases out of Tennessee,[29] one of them the *Goss* case out of Knoxville.

For reasons that I will try to develop briefly here I believed at the time that *Goss* laid down too inflexible a doctrine and developments in the years that came after have not removed my doubts. *Goss* torpedoed the then growing development of unitary geographic zoning that was being built on the foundations of the so-called "Nashville Plau" by striking down an obviously discriminatory but nevertheless useful transition device for bringing an end to the dual school systems. Moreover, by injecting inflexibility into geographic zoning at this instant in time, *Goss* gave a critically important shot in the arm to experiments just getting under way with giving pupils a "free choice" of schools. The point was that without some kind of safety valve available at least for the short run, a geographic zoning system that locked in uuhappy minorities whether black or white was simply unworkable in the initial stages of desegregation in many communities. If insisted on, families either moved out of the attendance zone, further coucentrating racial imbalances in housing or they withdrew their children and enrolled them in private schools. The alternative to this kind of locked-in geographic assignment was freedom of choice and it was toward this alternative that much of the school board response turned iu the wake of the *Goss* decision.

A brief description of the Nashville plan is helpful in jndging the minority transfer question. The plan was put in effect there in 1957 under the watchful

[24] Bradley, note 21, supra, at 324.
[25] *Bradley* v. *School Board of Richmond*, 382 U.S. 103, 105 (November 15, 1965).
[26] *United States* v. *Montgomery County Board of Education*, 89 S. Ct. 1670 (1969).
[27] *Rogers* v. *Paul*, 382 U.S. 198, 200 (December 6, 1965).
[28] *Dillard* v. *School Board of City of Charlottesville, Va*, 308 F. 2d 920 (1962).
[29] *Goss* v. *Board of Education*, 373 U.S. 683 (1963).

eye of District Judge William E. Miller, whose sensitivity and judgment toward racial problems over the years have been matched by few indeed. For 1957 a unitary system of zones was established for the first-grade level in all of the City's public schools. Each child entering first grade was initially assigned to the elementary school in his zone of residence and was permitted to transfer to another school only if he were in a racial minority in his school or class.[30]

The overtly racial character was troublesome but as a transitional device it could be justified on several grounds. First, it was a safety valve through which both black and white minorities could escape to schools where their own races were predominant. At first, all the whites and nearly all the blacks chose to escape but as the years passed the numbers of blacks who chose to remain in an integrated situation rose steadily and in time growing numbers of whites abandoned the inconvenience of going outside their attendance zone to school. A second and critically important feature of the minority transfer rule was to prevent white majorities from avoiding attendance at an integrated school. A white pupil was not permitted to transfer from a school merely because a Negro minority had elected to attend. Almost certainly this tended to stabilize the initial stages of the transition to a unitary system. This feature of holding down white minorities is of course lost if the minority transfer provision gives way to transfers based on unrestricted choice.

Judge Haynsworth in his dissent in the Charlottesville did not develop his position in the detail stated here but it is perfectly evident that these were the kinds of problems about which he was concerned. His own Court, he thought, had considered the question largely in abstract terms and the parties had not asked for consideration of practical consequences of the alternatives they pressed the Court to rule on. His is one of the few opinions I know on the subject of the minority transfer question that did seek to open the practical inquiry into the operations of the rule as a transitional device and in rerospect I regret that he did not carry the day in order that the alternatives could have been thought out better than they were at the time.

The assumptions the Supreme Court makes in *Goss* are that the minority transfer device tends to perpetuate segregation—a point entirely true—and secondly, that transfer provisions not based on state imposed racial conditions can be appropriate means for desegregation—a point also true but whether transfers granted in wholly nonracial terms are the most reasonable means in every case for bringing about a system of "just schools" in place of a system of "black" schools and "white" schools can be questioned.

Indeed the rigidity of the *Goss* ruling seems quite out of character with the insistence by the Supreme Court last year in *New Kent* and its companion cases that the end product must be no more dual schools and that the test in each case requires selection of alternatives that are more, rather than less, likely to produce a unitary system.[31] Nor do the current cases impose objections to making use of racial criteria—the assignment of faculty in the *Montgomery* case[32] and the growing use of optional attendance zones and majority to minority transfers are examples.[33]

To summarize, Judge Haynsworth in his Charlottesville dissent rested on the point that the question was more complex than the majority was ready to concede and more attention to his concerns for developing effective transitional devices might well have done much to head off the explosive move toward freedom of choice that came after the Fourth Circuit, and then the Supreme Court, struck down a transitional device essential in many cases to the initial establishment of unitary zoning. And more careful attention to the working of various devices such as minority transfers, paired schools, optional zones might have come sooner than has been the case.

In any event, the Haynsworth dissent in Charlottesville cannot be explained by asserting it demonstrates him to be out of step with the directions of the Warren Court.

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[30] *Kelley* v. *Board of Education of the City of Nashville*, 2 Race Rel. Law R. 21 (M.D. Tenn. 1957), 270 F. 2d 209 (CA 6, 1959), cert. den. 361 U.S. 924 (1959).

[31] *Green* v. *School Board of New Kent County*, 391 U.S. 430; *Raney* v. *Board of Education*, 391 U.S. 443; and *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968).

[32] *United States* v. *Montgomery County Board of Education*, 89 S. Ct. 1670 (1969).

[33] See, for example, *Brewer* v. *School Board of the City of Norfolk, Virginia*, 397 F. 2d 37 (1968).

THE "RACIALLY NONDISCRIMINATORY" SCHOOL SYSTEM

Across the years that followed the *Brown* dicisions in the Supreme Court a basic difference developed among the judges of the lower federal courts with respect to what, ultimately, was required to bring the dual school systems of the South into line with the requirements of the Fourteenth Amendment.

The new view—which only began to emerge in the 1960's—saw the end product as a system of "just schools," rather than a system that could include "black" schools and "white" schools from which discriminatory obstacles to admission had been removed.

The other and older view saw the end product as the removal of racial obstacles and burdens—and if at the end some white and some black schools remained as the collective results of unfettered choices by school patrons, there was no violation of the Fourteenth Amendment involved.

It was common to both views that racially invidious practices, when shown to exist or to he intended would not be tolerated in the name of the state. Most of the changes in the rules relating to school desegregation over the years came about in the context of demonstrated invidious discriminations and as a result it was simply not necessary to decide any more than that steps be taken to eliminate the results of invidious discrimination.

There gradually emerged, however, a series of school situations in which the difference in view toward the end product called for by *Brown* resulted in a difference in the outcome of a particular case. The *New Kent* case and the cases from the Sixth and Eighth Circuit decided with it are classic examples. If one assumes that *Brown* commanded only an end to burdens and discriminations respecting choice of schools, the decisions reached by the Fourth, Sixth and Eighth Circuits appear clearly correct. In the *New Kent* case, for example, the plaintiffs conceded they had an unencumbered opportunity annually to choose the white rather than the black school in the County. A view on the other hand that *Brown* commanded an actual undoing of the dual school system to produce a system of "just schools" calls for a diffrent result on the facts of the case: New Kent County operated two comprehensive schools, one traditionally for whites, the other for blacks. No attendance zones existed and each school served the entire couuty. Moreover, Negroes and whites were more or less generally distributed throughout the County. Thus by the comparatively straightforward move of zoning one school to serve one half of the County and the other school the other half, substantial integration would result. That kind of move would be a long step toward a system of "just schools," giveu the fact that the freedom of choice system had doue little to alter the original character of the two schools as "black" and "white."

In the *New Kent* case, Judge Haynsworth had remanded the case for inclusion of a minimal objective timetable that took account of the comprehensive timetable adopted only a short time before by the Fifth Circuit in the *Jefferson County* case.[34] Judges Sobeloff and Winter specially concurred, expressing approval of Judge Haynsworth's assertion that the *Jefferson* standards were applicable on remaud to the question of faculty integration and regret at the failure of the majority to reqnire on remand the establishment of a periodic review by the District Court to determine the effectiveness of the freedom of choice system in operation, particularly to see that residual effects of the past dual system were removed.[35]

The Supreme Court in reversing *New Kent* and its companion cases from the Sixth and Eighth Circuits on May 27, 1968, moved on to new ground well beyond that occupied previously by any decisions of the Circuit Courts. The Fifth Circuit's en banc decision in the *Jefferson County* case at the end of March 1967 had gone farther than any otber, though Judge Haynsworth' decision in *New Kent* two and a half month's later announced his accord with the Fifth Circuit standards of the *Jefferson* case (but see the Sobeloff-Winter concurrence for expression of the wish that the Fourth repeat specifically some of the things said in Jeffer-

[34] United States v. Jefferson County Board of Education, 372 F. 2d 836, aff'd on rehearing en banc, 380 F. 2d 385 (CA 5, 1967), cert. den. sub nom. Caddo Parish School Board v. U.S., 389 U.S. 840 (1967).

[35] Bowman v. County School Board of Charles City County, Virginia, 382 F. 2d 326, 330 (SA 4, 1967) for concurring opinions of Judges Sobeloff and Winter intended for Bowman and for the companion Green v. County School Board of New Kent. Virginia, 382 F. 2d 338 (CA 4, 1967).

son). What the Fifth had done in *Jefferson County* was to come down hard on insisting that the test of a desegregation plan was whether it did away with the vestiges of the dual school system and to test that question specified a quite detailed decree that called for regular reporting of information concerning progress toward a unitary system.

What the Fifth had not done in Jefferson County, and what was new in the Supreme Court's decision in the *New Kent* line of cases, was to impose the duty on a board to select among feasible alternatives those which were more rather than less likely to result in putting and end to the vestiges of the dual system. While the Fifth had called for periodic review of developments, it had said nothing this clear about actual implementation.

Back then to Judge Haynsworth's opinion for the Court in New Kent. What he said there seems clearly in line with what the Fifth, Sixth and Eighth Circuits were saying at the time. By keying Fourth Circuit views to those of the Fifth Circuit in *Jefferson County*, he was giving a quiet burial to the *Briggs* dictum [36] which had so long cast a shadow across the writings of the Fourth Circuit. (Judge Sobeloff's concurrence in *New Kent* contains a sensitive summary of problems *Briggs* posed for the Fourth, coming as it had from Chief Judge John Parker who did not live long enough thereafter to qualify its thrust.) [37] But one could say that Judge Haynsworth's decision in *New Kent* was out of step with the direction of the Warren Court only by concluding that the same would have to be said of the Fifth, Sixth and Eighth Circuits which were saying the same things in that period. What the Fourth had done, along with the other Circuits, was to bring itself in line for the Supreme Court to resolve that the end product called for by *Brown* was a system of "just schools" and that school districts were under a duty to select reasonable means best calculated to produce that result.

IN CONCLUSION

It has troubled me greatly that so much of the criticism directed recently at Judge Haynsworth has rested either on gross overstatement or seriously incomplete descriptions of the context in which he has acted. This is not to say that I have agreed with every one of his decisions, for I have not. At the time I would probably have decided the *Moses H. Cone Memorial Hospital* case [38] the other way, although the case was clearly a lot more difficult than was the *Burton* case that was the principal Supreme Court precedent in that period. Judge Haynsworth's decision later on the question of admitting Dr. Hawkins to the North Carolina Dental Society was hardly the "easy" case that some of the Judge's critics said it to be, as even a casual reference to the quite distant precedent's drawn on will attest—and the result is a victory over racial discrimination.[39] Both *Hawkins* and *Moses Cone* draw on state action concepts and a comparison of the two opinions reflect, I submit, the capacity of Judge Haynsworth to grow in breadth and sensitivity on the job.

I also think the decision to abstain in the *Prince Edwards County* case was wrong. Partly this is because I believe the Abstention Doctrine itself was a mistake, and a mistake of the Supreme Court's own making.[40] The abstention in *Prince Edward* came about the time that doctrine had reached high tide and just ahead of the time that the Court itself began cutting back on abstention with its decision in the *England* case.[41] Moreover, by the time the Supreme Court reached the Prince Edward case for review, it had access to the opinion of the Virginia Supreme Court of Appeals, to wait for which had been the basis for

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[36] Briggs v. Elliott was a companion case to Brown v. Board of Education and came out of South Carolina. On remand of Briggs to the District Court of three judges following the Supreme Court's decision in Brown II, Chief Judge John Parker of the Fourth Circuit attempted as a member of the Briggs panel to explain what Brown had decided. He said, in language often quoted thereafter:

"Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F. Supp. 776, 777 (E.D.S.C. 1955).

[37] See Bowman, note 35, supra, at 336 ff.

[38] Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (CA 4, 1963).

[39] Hawkins v. North Carolina Dental Society, 355 F. 2d 718 (CA 4, 1966).

[40] Griffin v. Board of Supervisors, 322 F. 2d 332 (CA 4, 1963), reports the decision to abstain. A thoughtful and useful collection of materials on abstention appears in Currie, Federal Courts 500–530 (1968).

[41] England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

the abstention by the Haynsworth panel. Yet regardless where the Abstention Doctrine came from, abstention on the facts of *Prince Edward* was in my judgment wrong and Judge Haynsworth must accept his part of the responsibility for the decision.

Perhaps there are some other decisions, too, that I would have turned the other way. but I cannot read his record in general or in particular as that of a dogmatic or doctrinaire man nor as that of a man out of step with the need to afford proper protection against racial discrimination. The suggestion offered during the hearings before the Judiciary Committee that his dissent in the *Brewer* case [42] out of Norfolk was in some fashion improper and at odds with the just-announced *New Kent* decision of the Supreme Court simply will not survive a reading of the two cases. Again, in the *Chambers* case involving what were claimed to be racially discriminatory dismissal of Negro teachers, Judge Haynsworth cast the deciding vote for a 3 to 2 Court of Appeals that shifted to school authorities the burden of showing that discrimination had not motivated the dismissal.

All things considered, I find Judge Haynsworth not easy to characterize. I can cite instances in which he has declined to give strict construction to procedural rules where, to have done so. would have denied a party his day in court.[43] He has declined, I believe quite correctly, to stretch a statute limiting tbe contempt powers of lower federal courts to cover conduct which he regarded both as a contempt of the court and quite unconscionable.[44] In a doctrinally important habeas corpus case Judge Haynsworth abandoned a Supreme Court precedent before the Supreme Court itself had done so (and the Court in a later unanimous opinion said both that Judge Haynsworth's result was correct and that it was correct for the very reasons he gave).[45] But where arguments have failed to persuade him an established precedent should not be applied to the case at hand, he has followed the precedent.

To sum up: Judge Haynsworth is an intelligent, sensitive, reasoning man. He does not fit among that small handful of front-running federal judges who have consistently made new law in the racial area. He has earned a place, however, among those who serve in the best tradition of the system as pragmatic, open-minded men, neither dogmatic nor doctrinaire. His decisions, including those in the racial area, have been consistent with those of other sensitive and thought ful judges who faced the same problems at the same time. And it simply cannot be said that his record in the racial field marks him as out of step with the directions of the Warren Court.

Thus the question for me is not whether I would have made another nomination for the Supreme Court. It is rather the questiou whether Judge Haynsworth possesses the qualities required to become a fine Justice of the Supreme Court. My view is that he will make a first-rate Associate Justice.

I hope this Committee—and later, the Senate itself—will support the nomination of Judge Clement Haynsworth to the Supreme Court of the United States.

STATEMENT BY WILLIAM VAN ALSTYNE—IN COMMENT ON APPOINTMENT OF JUDGE CLEMENT HAYNSWORTH TO THE SUPREME COURT OF THE UNITED STATES

It is not surprising that a Supreme Court appointment from the South, by a President who campaigned with some degree of criticism of the Warren Court, should attract a measured amount of liberal skepticism. The degree of reaction to some of the truly fine people who have too quickly given it currency. In those areas of statutory interpretation and constitutional adjudication where the issue is so unsettled that judicial discretion must necessarily play a major role, Judge Haynsworh's record cannot be seen as illiberal.

In Hawkins v. North Carolina Dental Society, Judge Haynsworth authored the court of appeals opinion which desegregated the North Carolina Dental Association, rejecting its claim that it was not subject to the equal protection clause of the 14th Amendment. He joined as well in North Carolina Teachers

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[42] Brewer, note 33, supra.
[43] A good example is *Markham* v. *City of Newport News*, 292 F. 2d 711 (CA 4, 1961).
[44] Griffin v. County School Board of Prince Edward County, Virginia, 363 F. 2d 206 (CA 4. 1966), dissenting opinion.
[45] Peyton v. Rowe, 391 U.S. 54 (1968), affirming 383 F. 2d 709 (1967).

Association v. Asheboro City Board of Education, reversing a lower federal court which had upheld the displacement of Negro teachers who had lost their jobs to whites when schools were integrated. He also shared the court's decision in Newman v. Piggy Park Enterprises, applying the Civil Rights Act against a claim that insufficient food was sold for consumption on the premises to bring the business within the statute.

In the field of criminal justice, he authored an extraordinarily careful opinion in *Rowe* v. *Peyton*, extending the right of prisoners to have their convictions reviewed on habeas corpus—a new development later affirmed by the Supreme Court. He jointed in *Crawford* v. *Bounds* to protect defendants in capital cases from being sentenced by death-prone juries from which all expressing any reservation to capital punishment had been excluded—a new development also subsequently affirmed by the Supreme Court in a related case. In *Pearce* v. *North Carolina*, he applied a constitutional principle newly developed at the federal level in his own circuit to protect defendants from harsher sentences following retrial—again in advance of the Supreme Court which affirmed the decision several months later.

In respect to First Amendment rights, he joined in the first federal decision which struck down a state law restricting the right of university students to hear guest speakers on campus—a principle later expanded by a half-dozen other federal courts and indirectly approved by the Supreme Court in a related case just this year.

On occasion when his opinion has differed conservatively from that of more liberal jurists, it has not been without care or reason. Thus, his conclusion in *Baines* v. *City of Danville* that only an extraordinary kind of civil rights case could be removed from a state court to a federal court was accompanied by a painstaking analysis with which a majority of the Supreme Court subsequently agreed in *Peacock* v. *City of Greenville*. Similarly, his conclusion in *Warden* v. *Hayden* that an otherwise constitutional search is not unreasonable because its object is only to secure evidence of a crime was also subsequently shared by a majority of the Supreme Court.

I do not submit that these decisions warrant that Judge Haynsworth will be a "liberal" justice. His record on the court of appeals does not—and in the nature of things could not—enable us to predict his votes in the substantially different role of associate supreme court justice. They do indicate, however, that he is an able and conscientious man who will approach his duties on the Supreme Court with a spirit of open-mindedness as well as an appreciation of the difficulties of the judicial process.

STATEMENT BY FLOYD B. MCKISSICK, NATIONAL CONFERENCE OF BLACK LAWYERS

I represent the National Conference of Black Lawyers. Our organization was found in Capahosic, Virginia in December, 1968 to challenge the racism in our legal system, to articulate the needs of the black community and to provide the legal expertise necessary in the black American's struggle for equality. We number in our ranks attorneys representing the entire spectrum of both the private and public sectors, as well as elected governmental officials from the local, state and national levels. We are currently organizing local conferences of black lawyers throughout the nation.

On behalf of the National Conference of Black Lawyers, I come before you today to speak in opposition to the confirmation of Judge Clement F. Haynsworth, Jr. In the view of our organization, Judge Haynsworth is fit neither professionally nor personally to sit as an Associate Justice of the United States Supreme Court the road to equal rights of citizenship for black people in this country has been long and arduous. As a Court of Appeals judge, Judge Haynsworth was in an especially good position to fulfill some of the American promise of equal rights under law. While it is true that some civil rights cases in which the Fourth Circuit or panels of the Court ruled unanimously in favor of black litigants Judge Haynsworth voted along with the rest of his judicial brethren, he almost invariably took a segregationist position where the Court was sharply divided on civil rights issues. As a dissenter from progress he has shown himself hostile to the fundamental Constitutional rights of black Americans. This antipathy can be illustrated in a number of cases.

In the Fall of 1959, all public schools in Prince Edward County, Virginia were closed by local authorities who, opposed to school desegregation, were engaged

in what has been termed "massive resistance." In 1964, a lawsuit by Negro parents to require reopening of the public schools was finally won in the United States Supreme Court. *Griffin* v. *School Board*, 377 U.S. 218 (1964). The Supreme Court unanimously reversed that portion of a decision which held that the federal courts abstain from ruling pending action by the state courts of Virginia, Justice Black writing for the Court stated:

". . . [W]e hold that the issues here imperatively call for decision now. The case has been delayed since 1951 by resistance at the state and county level, by legislation and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in Brown v. the Board of Education, supra, had been denied Prince Edward County Negro children. We accordingly reverse the Court of Appeals' judgment remanding the case to the District Court for abstention." 377 U.S. at 229.

In the early 1960's many local school boards seeking to avoid desegregation adopted a transfer policy which allowed students in a racial minority in their neighborhood to transfer into a school where their race was in a majority. Judge Haynsworth dissented from a 3 to 2 decision of the Fourth Circuit which outlawed this practice. *Dillard* v. *School Board of the City of Charlottesville, Va.*, 308 F. 2d 920 (4th Cir. 1962), *cert. den.*, 374 U.S. 827 (1963). The Supreme Court later held this device to be an unconstitutional attempt to preserve segregation. *Goss* v. *Board of Education*, 373 U.S. 683 (1963).

In 1965, the Supreme Court unanimously ruled federal courts must consider the question of racial segregation of public school teachers as part of school desegregation suits brought by Negro pupils. *Bradley* v. *School Board of the City of Richmond*, 382 U.S. 103 (1965). *Bradley* reversed two decisions to the contrary by Judge Haynsworth writing for a 3 to 2 majority of the Fourth Circuit. *Bradley* v. *School Board*, 345 F. 2d 312 (4th Cir. 1965); *Gilliam* v. *School Board*, 345 F. 2d 325 (4th Cir. 1965).

In 1968, the Supreme Court ruled unanimously that school desegregation plans must result in integration of the schools in order to comply with school boards' duty to disestablish the racially segregated school systems created under segregation laws and practices. *Green* v. *County School Board of New Kent County, Va.*, 391 U.S. 430 (1968). This reversed decisions by Judge Haynsworth, again for a 3 to 2 majority of the Fourth Circuit, which ruled that freedom of choice plans were valid without regard to the actual results achieved with respect to desegregation. 382 F. 2d 338 (4th Cir. 1967).

Simkins v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. den.*, 376 U.S. 938 (1964), was an action by Negro patients, dentists and physicians who sought admission to an all-white hospital constructed with federal funds under the Hill-Burton Hospital Construction Act and operated by a private non-profit agency. The Fourth Circuit held a 3 to 2 majority that the "separate but equal" clause of the Hill-Burton Act was unconstitutional, and that a facility receiving substantial federal funds must not discriminate on account of race. Judge Haynsworth dissented from this decision. Judge Haynsworth's views in *Simkins* were, of course, rejected by Congress when it enacted Title VI of the Civil Rights Act of 1964.

In recent times, we have become increasingly aware of the importance of scrutinizing a judge's conduct off the bench as well as his judicial craftsmanship. In this regard, when weighed in the balance, Judge Haynsworth must be found wanting. While serving as a United States Circuit Court Judge, Judge Haynsworth was a member of several racially exclusive organizations. He belonged to Poinsett and Green Valley, two all-white clubs in Greenville, South Carolina, and to the all-white Commonwealth Club in Richmond, Virginia. It was the Commonwealth Club where in February of 1968 a reception was held for the governor of Virginia to which all members of the state legislature were invited except the state's sole black legislator because of the club's policy of excluding non-white guests. A person with these types of segregationist involvements is not suited to sit on the nation's highest court. Surely in 1969 a non-white litigant should not be forced to plead his case before a Supreme Court which includes a jurist who by day must decide the most burning issues of racial justice and who by night is himself a party to racist policies which bar organizational membership and even guest privileges to certain citizens solely on the basis of their race.

The National Conference of Black Lawyers urges this Committee to weigh carefully the analysis we have made of Judge Haynsworth's suitability for the

United States Supreme Court and weigh it along with those others that will be and have been made on his professional and ethical qualifications. The constitutional requirement of confirmation by the Senate must mean more than a perfunctory ratification of the President's choice. The Supreme Court plays a unique role in the shaping and growth of our institutions. It describes the contours of freedom and sets the course of national direction. It is the court from which there is no appeal—the last resort of the man who accepts and believes in our system of law. Its impact and influence transcends administrations to determine and characterize whole eras of our history as a people. Whatever may have been Judge Haynsworth's suitability to serve on a lower federal court, completely different considerations must come into play when the question is one of a seat on the highest court in the land. We are not in the realm of a simple "liberalism" versus "conservatism" debate. We are in the all together different dimension of questions concerning our national destiny. Black people do not want their destinies in the hands of Clement F. Haynsworth, Jr.; nor can the nation as a whole—black and white—afford to have any part of its destiny there.

Black people have long been the victims of the law in this society. It was the law which created, protected and enhanced the institution of American chattel slavery. It was the law which provided the onerous slave codes to govern in oppressive detail the lives of millions of blacks before their emancipation, and which retnrned to perform the same function through the notorious Black Codes after emancipation. It was with the law that the racist architects of segregation built a Jim Crow society which is still intact a decade and a half after *Brown* v. *Board of Education* and more than a century after the Emancipation Proclamation. It is the law, through its structural inequality amounting to institutionalized racism, which daily by way of the money bail system, consumer laws and myriad other means works to the disproportionate disadvantage of the nation's poor and non-white.

The Report of tbe National Advisory Commission on Civil Disorders (May 1, 1968) told the nation that we live in a racist society. Black people—and in particular, black lawyers—have known this for some time. Thus far the law has proved inadequate in attempts to remedy this condition, but some advance has been made. If, relying on the legal system, we are to continue to give our people hope, then that system must give ns *cause* for hope. If we are to continue growing into health as a nation of free and diverse men, we cannot afford a retreat now from the struggle for racial justice. The ascendance of Judge Haynsworth to the bench of the United States Supreme Court, as the first step in such a retreat, would dim the light of hope for change tbrough legal means in the hearts of millions of Americans and diminish, world-wide, confidence in the American system of justice.

For all of the foregoing reasons, the National Conference of Black Lawyers respectfully, but vigorously, urges this august Committee to disapprove the nomination of Clement F. Haynsworth, Jr. to the United States Supreme Court.

Thank you.

STATEMENT BY VICTOR RABINOWITZ, PRESIDENT, NATIONAL LAWYERS GUILD

The nomination of Chief Judge Haynsworth to the United States Supreme Court follows the release of the President's Commission on Civil Disorders by little more than one year. That report found that the nation was being split apart by the very real grievances of Black people which had gone unremedied since the Civil War amendments made Blacks full and equal citizens of the nation. Earlier this year, a follow-up study by members of the President's Commission only indicated that, within tbe intervening year, the situation had worsened.

We bring up the Commission Report and its conclusions because the Supreme Court in the last few decades has by many been considered the catalyst for such grudging reform as has taken place. Its interpretations of the post Civil War constitutional amendments and civil rights acts have at least given some token hope that Blacks might eventually obtain equality in America.

Racist judicial concepts, written into the law after the Civil War by the Supreme Court itself, have slowly been eroded. The separate but equal concept has been rejected; the concept of what constitutes unconstitutional or illegal action on the part of public officials or private persons has been broadened. And Congress has responded to pressures generated by Supreme Court decisions with

new civil rights acts. But, according to virtually every student of American race relations, the work of unsung equality in fact has barely begun.

The appointment of Chief Judge Haynsworth must he measured by the extent of this barely started work. Moreover, the appointment must be scrutinized with special clarity in light of the recent ascension of Mr. Chief Justice Burger. For joining Judge Danaher's dissent in *Smuck* v. *Hobson*, 408 2d 175 (D.C. 1969), the recent suit to desegregate and equalize schools in the District of Columbia, the new Chief Justice disagreed with his circuit court colleagues that the city's Black school children were entitled to judicially mandated relief from abysmal and inhuman school conditious. He would have dismissed their case, thereby showing "judicial restraint." *Smuck* v. *Hobson*, 408 F. 2d 175 at 193. In short, the new Chief Justice had indicated that he felt the point had been reached where courts should start backiug off from the more sophisticated forms of racial discriminations. The Chief Justice's decision in the Powell exclusion case also emphasized this belief in restraint.

The National Lawyers Guild believes that this nation cannot tolerate two appointments to the Supreme Court in one year of men whose past records indicate hostility to further necessary steps to insure that the grievances of the Black and the poor are relieved. The work of insuring equality mnst go forward. Our concepts of fairness have historically been articulated by the Courts. Congress, of course, also must play a key role in promoting social legislation, but the underlying moral principles flow from the concepts of equity which are or should be at the heart of the judicial process.

We conclude that Chief Judge Haynsworth is not fit for a seat on the Supreme Court because he has not demonstrated that he understands that the vindication of America's pledge of equality is vital for the snrvival of this nation.

Let us review his record in context. Chief Judge Haynsworth's role in the desegregation decisions of his circuit can only be fully understood in light of the Supreme Court mandates rendered in the Brown decisions of 1954 and 1955. It mnst be remembered that in 1954 the Snpreme Conrt had ruled that "separate educational facilities are inherently unequal." The following year the Supreme Court came down with its much debated "all deliberate speed" decision which in recent years has been severely critized for laying the groundwork for southern resistance to desegregation. Yet, it was clear that, even within the context of the concept of all deliberate speed, the Court intended that federal judges press hard for full integration.

The Court emphasized that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." It then charged the federal judiciary with the responsibility of insuring that local school boards "effectnate a transition to a racially nondiscriminatory school system."

These Supreme Court decisions became the law of the land, just as if this Congress had enacted new legislation. Federal judges sitting in lower courts were duty bound to enforce that law. Clearly, however, many helped school boards flount the law. Ten years after the Brown decision, desegregation had barely begun. Where did Chief Judge Haynsworth stand while the law was being snbverted? Did he support or oppose local school officials in their efforts to nullify the constitution and defy the law?

Being generous, one cannot but characterize Chief Judge Haynsworth's record as being soft on this most brutal form of lawlessness.

In case after case, Haynsworth voted in favor of a position which served to retard progress toward desegregation. Typically, in his opinions, he avoided granting relief by remanding cases to the district courts for further investigation, or refused to grant relief pending state court action, or simply granted inadequate relief.

Green v. *School Board of New Kent County*, 391 U.S. 430 (1968), was one of a number of cases where Haynsworth's position on the duty of the courts to insure desegregation was rejected by the Supreme Court. In *Bowman* v. *County School Board of Charles City, Va.*, 382 F. 2d 326, (1967) the court of appeals' case where the issue in *Green* was decided, Chief Judge Haynsworth upheld a freedom of choice plan and refused to order the school board to assign teachers on a non-racial basis, Judge Sobeloff, concurring specially, said this of the adequacy of the relief granted by the majority:

"I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to Order the school systems to take fnrther steps at this stage. No legally acceptable justification appears, or is even

faintly intimated, for not immediately integrating the faculties. The Court underestimates the clarity and force of the facts in the present record . . . The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

"It is time for this circuit to speak plainly to its district courts and tell them to get on with their task—no longer avoidable or deferrable—to integrate their faculties." *Bowman*, at p. 336.

In *Dillard v. School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (1962), another of the freedom of choice cases, Chief Judge Haynsworth dissented from a majority decision outlawing a transfer device utilized by the school board in an attempt to avoid desegregation. The Supreme Court rejected the Haynsworth position in *Gross v. Board of Education*, 373 U.S. 683 (1963).

The most notorious controversy involving school desegregation in the fourth circuit revolved around the closing of the schools of Prince Edward County, Virginia. Even in the face of flagrant violations by school administrators, Haynsworth refused to act. In *Griffin v. School Board, Prince Edward County*, 322 F. 2d 332 (1963) a lawsuit brought to require the reopening of public schools, Chief Judge Haynsworth wrote an opinion for the Court denying relief pending action by the Virginia Courts. Decisions such as this one guaranteed delay in the implementation of the *Brown* mandate, and fell right in line with dilatory tactics adopted by Virginia segregationists. *Griffin*, too, was reversed by the Supreme Court. 377 U.S. 218 (1964).

In a second case decided by the Court of Appeals involving the Prince Edward County School Board, Chief Judge Haynsworth dissented from a three-two decision citing certain school district supervisors for contempt for appropriating over $100,000 of public monies to so-called "private schools' which were set up for white students. Although Chief Judge Haynsworth admitted that the action of the supervisors was "unconscionable," he refused to sanction the court's action punishing these offenders.

Bradley v. The School Board of the City of Richmond, Va., 345 F. 2d 310 (1965), was another significant school case in which Chief Judge Haynsworth was subsequently overruled by the Supreme Court. There, where the issue concerned integration of staffs, Chief Judge Haynsworth, writing for the court, said, "When direct measures are employed to eliminate all direct discrimination in the assignment of pupils, a district court may defer inquiry as to the appropriateness of supplemental measures . . . The possible relation of a reassignment of teachers to protection of the constitutional rights of pupils need not be determined when it is speculative." Again, Chief Judge Haynsworth favored delay and inaction.

The Supreme Court, holding that the district court should be ordered to hold a hearing on plaintiffs' claims regarding teacher discrimination, had this to say about the Haynsworth approach:

"There is no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative. Nor can we perceive any reason for postponing the hearing . . . these suits had been pending for several years; and more than a decade had passed since we directed desegregation of public facilities 'with deliberate speed' . . . Delays in desegregating school systems are no longer tolerable." *Bradley* v. *The School Board of the City of Richmond, Va.*, 382 U.S. 103, (1965), reversing 345 F. 2d 310.

In short, when the Supreme Court finally realized that the *Brown* decisions had been flouted by local officials with the sanction of the courts, Chief Judge Haynsworth's role was the subject of severe Supreme Court criticism. Not only were his decisions reversed, the Supreme Court also found *no merit* to one of his latest efforts. The lower courts had failed the Supreme Court and Chief Judge Haynsworth clearly was one of those responsible.

Perhaps, the clearest reflection of Chief Judge Haynsworth's judicial philosophy is seen in a group of cases challenging racial segregation in health facilities, where he has stated his views on the obligation of quasi-public facilities to comply with the requirements of the Fourteenth Amendment. In one of the important cases decided by the Fourth Circuit, *Eaton* v. *Board of Managers of James Walker Memorial Hospital*, 261 F. 2d 521 (1958), Chief Judge Haynsworth joined in an opinion, written for the court by Judge Soper, holding that the hospital was a private facility, could discriminate against black physicians, and that the elements of state action alleged by the plaintiffs were not sufficient to bring the hospital within the ambit of the Fourteenth Amendment.

Chief Judge Haynsworth further clarified his position on the state action question in his dissent in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963), cert, den., 376 U.S. 938 (1964), one of the most significant cases on this issue. There he expressed the view that the additional element of state action—receipt of federal subsidies under the Hill-Burton Act— was not sufficient to distinguish the *Simkins* case *Eaton*, and that, furthermore, the Supreme Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) did not effectively overrule Judge Soper's holding in *Eaton*. Chief Haynsworth's position was clear: the courts should not intervene to enforce the Fourteenth Amendment in the operations of any institution that could make any colorable claim to being a private facility. According to Chief Judge Haynsworth, the federal courts had no responsibility to Blacks, seeking equal services in federally assisted medical facilities and health programs. As a consequence, a colorably private hospital was free to discriminate racially and limit its life-saving services to white patients and invaluable staff privileges to white physicians and snrgeons.

It was reported in the press that Cbief Judge Haynsworth, in an attempt to explain away his earlier pro-segregation opinions, noted that none of the federal judges were "writing" at that time the way they are now. However, even when other judges were changing their views, and reacting with greater sensitivity to the issues which Black plaintiffs were raising, Chief Judge Haynsworth steadfastly maintained his racist position. *Eaton v. Grubbs*, 329 F. 2d 710 (1964), decided after *Simkins*, is a case in point. There the court decided, in a unanimous opinion by Judge Sobeloff, that the James Walker Hospital—the same institution involved in *Eaton v. Board Managers*—was likewise subject to the prohibitions of the Fourteenth Amendment, Chief Judge Haynsworth grudgingly concurred, writing an opinion in which he indicated that although he felt bound by *Simkins*, he was still "unpersuaded" that his views expressed in his dissent in *Simkims* were incorrect.

The concept that public monies cannot be channelled into the hands of those who would discriminate on the basis of race is merely a bare heginning in the struggle for equality. Obviosly, however, Chief Judge Haynsworth sees such a ruling as forming the outer limits of judicial action and so far out he can barely approve of it, even after it has become the accepted law of the land.

President Nixon has said that he intends to reshape the philosophy of the Supreme Court. He has indicated his interest in law and order men and strict constructionists. By now, however, this body should understand what he means. His appointees will make it more difficult for the victims of the society to secure relief in the courts. At the same time, they will tigbten the noose of the criminal law which is employed against so many of the poor and the Black who have been driven into anti-social behavior. "Strict Construction," then, will add to the "crime problem" by limiting the relief granted by the jndiciary in their civil capacity, aud attempt to cure it through harsh imposition of criminal sanctions.

The public statements of the President as well as the judicial record of Chief Judge Haynsworth give credence to the belief that he is a so-called "strict coustructionist." If this is so, the confirmation of Chief Judge Haynsworth portends a breakdown in constitutional government. There is no place in the American scheme of government for "strict constructionism." That concept is at odds with the very essence of the role of the Supreme Court as the final arbiter of the meaning of the Constitution. The Constitution is never to be interpreted with the strictness of a code of law or of a private contract. It is but a bare outline of principles, creating a Repnblic, establishing a form of government, and declaring fundamental principles. Accordingly, Justices of the Supreme Court, in search for the correct understanding of the principles set forth in the Constitution, "must never forget that it is a constitution [they] are expounding." *McCulloch* v. *Maryland*, 4 Wheat 407, 4 L. Ed. 579 (1818). A bare bones document, declaratory of essential principles, is hardly a fit object of strict construction. Imposition of ironclad and restrictive notions of the meaning of the Civil War Amendments and the Bill of Rights in the modern reconstruction of this Nation, through the imprimatur of Supreme Court decisions, can only result in the cessation of the system of checks and balances which the fonnders of this Nation deemed so necessary for the orderly progress under a system of constitutional government.

The Senate of the United States should not tolerate this form of "strict con-

struction." For if it does, it will be only adding to the list of national woes which the Congress itself one day must resolve.

The function of the Senate to give advice and consent to judicial nominations is a political one. It requires the Senate to make an independent determination of the nominee's fitness. It mandates that the Senate shall not act as a mere "rubber stamp" but will conduct a thorough and sifting examination into the jurisprudential and social views of the nominee. The exercise of this function is governed by altogether different principles when the nomination of a Justice of the Supreme Court is being considered rather than nominations to fill vacancies in administrative agencies. Arguably, an appointee to an administrative agency ought to reflect the philosophy and approach to goverument of the President who nominates him, but there is no constitutional warrant for confirmation of a nomination to the Supreme Court to be made on the same basis. A Supreme Court Justice is appointed for life and ordinarily may be expected to cast an influence on the Government after the President who nominated him no longer holds office. An appointment to the Supreme Court should not continue to be nor become the device for shackling the Nation with a philosophy that may soon prove to be only a sport on the waters of change. Especially is this so where, as here, the President did not commaud a clear majority of the popular vote.

Thus, the question for the Senate to decide is not whether or not Chief Judge Haynsworth had had or has his hands in someone's pockets or is a "crony" of someone who might have the President's ear, but the question is one which transcends such relative petty inquiries. The issue is whether or not Chief Judge Haynsworth is under the sway of a philosophy of government that his confirmation would be detrimental to the health and welfare of the Nation. Another way of putting the issue is: will his confirmation bring "US TOGETHER" or will it merely serve to imprison us in a greater polarization of social forces?

Finally, we do not question either Chief Judge Haynsworth's integrity or his character, only his fitness for the position to which he has been nominated. We submit that Chief Judge Haynsworth does honestly hold the views which he has expressed in the decisions which we have cited in this testimony. It is because of his undoubted sincerity about both the procedural and substantive constitutional limitations upon judicial power to resolve questions of poverty and race that we oppose his nomination and declare him unfit for confirmation of an Associate Justice of the Supreme Court of the United States.

STATEMENT OF HENRY L. MARSH, III, ON BEHALF OF THE OLD DOMINION BAR ASSOCIATION OF VIRGINIA

Mr. Chairman, I appreciate the opportunity to testify before this committee on behalf of the Old Dominion Bar Association of Virginia, an association of all the black attorneys in Virginia. We represent the Americans who need the protection of the system the most—the poor, the black, the exploited—but in fact these Americans are the chief victims of this system which we so proudly call a democracy.

We are vehemently opposed to the confirmation of Judge Clement F. Haynsworth, Jr., as Associate Justice of the Supreme Court of the United States. We oppose his confirmation because of what it will do to our country.

For those of us who have labored long and hard during the many years of racial injustice, the judicial system in general and the Supreme Court in particular has provided a bright ray of hope. For many years the Supreme Court was in fact the sole haven of refnge for the victims of prejudice. Now it is becoming clear to us that Mr. Nixon and his Attorney General, Mr. Mitchell, have decided to shut off that ray of hope by appointing men to the Court who would reverse the movement for racial equality.

Judge Haynsworth stated in an article in Newsweek Magaziue on August 25, 1969, that the attacks on his civil rights record were based on positions he took in the 1950's, "wheu none of us was thinking or writing as we are today." The record shows, however, that Judge Haynsworth has continued well into the late 1960's to uphold segregation.

Under the Haynsworth philosophy, the public schools in Prince Edward County could still be closed. How can you justify drafting young black men to fight in

Viet Nam to secure freedom for the South Vietnamese when under the Haynsworth philosophy black men and their brothers and sisters would not even get free public education right here in this country. Gentlemen, this decision was made in 1963.

Under the Haynsworth philosophy, hospitals receiving Hill-Burton Funds could still segregate and deny services to needy persons on the basis of race. Can you imagine a black soldier returning from Viet Nam who needed medical attention or if needed by a member of his family and being turned away solely because of race? Gentlemen, this decision was made in 1963.

Under tbe Haynsworth philosopby, freedom of choice plans would still be valid even if they resulted in all back schools and 90% all-white schools. Can you imagine a black soldier fighting in Viet Nam to secure equality and justice for the South Vietnamese returning to this country 15 years after the Brown decision and still be forced to send his children to all-black or almost all-white schools. Gentlemen, that decision was made in 1967.

In the area of race relations, America's No. 1 national problem, Jndge Haynsworth's record in the 1960's is not one of moderation by national standards, rather it is one of extreme delay and evasion in complying with the Supreme Law of the land. Such a record of defiance to Law and order should not be rewarded.

Now it is becoming evident that President Nixon is shifting the major responsibility for civil rights enforcement from the Executive branch to the courts.

Since Mr. Nixon became President, the Secretary of Health, Education and Welfare has, as a result of White House and other pressures, 1) delayed for 60 days fund cut-offs to 5 Southern School districts (The New York Times, Feb. 2, 1969, Tom Wicker, p. 13 E) ; 2) has given 12 recalcitrant South Carolina school districts more time to desegregate (The Washington Post, June 27, 1969, A2) ; 3) delayed signing 6 fnnd cut-off orders on his desk since April and May (The Washington Post, June 27, 1969, A2) ; 4) issued a policy statement on July 3, 1969 that stated that the desegregation deadlines for 1969 and 1970 were "too rigid to be either workable or equitable" and the South would not be held to them. The statement also declared: "To the extent practicable, on the Federal level the law enforcement aspects will be handled by the department of Justice . . ." 5) and most recently the extraordinary request by the Secretary to extend desegregation deadlines for 30 Mississippi school districts. (The New York Times, August 21, 1969, A1) All of these HEW statements and deeds add up to an abdication by HEW of its duty to enforce the law.

The Nixou Administration is also favoring a bill in Congress that will allow the Equal Employment Opportnnity Commission to go into court on an individual basis rather than issue cease and desist orders.

The net result of the present withdrawal of HEW enforcement and the failure to provide EEOC with cease and desist power is to place the initiative for civil rights enforcement on a reluctant and unsympathetic Attorney General, the small staff of the EEOC or the disadvantaged victim of prejudice. The Nixon Administration's emphasis on court action in the civil rights field makes it imperative that the conrt of last resort not waiver in its devotion to equality for all. The attempt of President Nixon to appoint to the Supreme Court a mau whose record shows a firm commitment to the status quo is an invitation to obstruction.

Inscribed on the front of the Supreme Court are the words: "Equal Justice Under Law." These words tell all who enter of America's creed. We have patiently worked within the system on the belief that our institutions are guided by this principle of "Equal Justice Under Law," and that they can and will right the unrightahle wrongs endured by black people in this conntry. Yet when we confront daily the problems of American race relations, we see, as our black brothers and sisters see that this system is not willing to make the principle of "Equal Jnstice Under Law" a reality. President Nixon's nomination of Judge Clement F. Haynsworth, Jr., to the Supreme Court symbolizes to all victims of prejudice the unwillingness of this Administration to bridge the immense gap between American principle and practice.

Judge Haynsworth's foot dragging record in civil rights gives hopes to all obstructionists that this nation's commitment to racial equality can be stopped. If the Senate confirms Judge Haynsworth, millions of Americans who have painfully kept faith with our system will be convinced that the system will never fulfill its promises of equality for all nnder law. Gentlemen, I remind you that a house divided against itself can not stand.

STATEMENT OF JULIUS LEVONNE CHAMBERS ON BEHALF OF THE SOUTHEASTERN LAWYERS ASSOCIATION

Mr. Chairman and members of the Committee:

I appear before you today on behalf of the Southeastern Lawyers Association to speak in opposition to the nomination to the United States Supreme Court of Judge Clement F. Haynsworth, Jr. I thank you for this opportunity to express the views of our organization.

The Southeastern Lawyers Association is composed of approximately 200 black lawyers practicing in Virginia, North Carolina, South Carolina and Georgia. A large majority of our membership practices within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Two of our members, Samuel W. Tucker and Henry Marsh, III, have testified in oppositiou to Judge Haynsworth on behalf of other organizations. We join in their remarks. I would point out that each of them has practiced extensively as counsel in civil rights cases in the United States Court of Appeals for the Fourth Circuit and in the Federal District Courts in Virginia. Their testimony reflects their own long experience in these courts. I will only add one further example to the testimony which has been offered demonstrating Judge Haynsworth's resistance to the United States Supreme Court's decisions in school desegregation cases and then turn to Judge Haynsworth's role as Chief Judge of the United States Court of Appeals for the Fourth Circuit.

On May 27, 1968 the Supreme Court handed down its decision in *Green* v. *County School Board of New Kent County*, 391 U.S. 430, reversing a decision by Judge Haynsworth and holding that freedom of choice is unconstitutional where it does not eliminate the continued existence of all-white and all-black schools. On May 31, 1968, four days later, the Fourth Circuit announced its decision in *Brewer* v. *School Board of the City of Norfolk*, 397 F. 2d 27. The decision had, of course, been written prior to *Green*. The majority opinion had accurately anticipated *Green*, thus precluding the necessity of further briefing or argument. Judge Haynsworth, however, filed a dissent expressing again his preference for freedom of choice, a position which had just been unanimously repudiated by the Supreme Court. I would also point out that Judge Haynesworth's views on school desegregation cases have, until recently, been the majority view of his court and have been consistently softer than the decisions of other Courts of Appeal, particularly the Fifth Circuit.

We, of course, are dismayed that a Judge be nominated to the Supreme Court who has so consistently and so recently taken positions at variance with each Justice sitting on the United States Supreme Conrt. More importantly, however, is the fact that he should write and file an opinion directly in the face of a unanimous Supreme Court. A Circuit Judge has the duty of ensuring compliance with the decisions of the Supreme Court. A Chief Judge has an added responsibility in this area. Judge Haynsworth's failure to withdraw his dissent in *Brewer* hardly comports with his duty as Chief Judge. Such a gratuitous expression of his personal opinion could only encourage delay and resistance from reluctant District Court Judges and school officials. The Supreme Court had said "*now*" and Judge Haynsworth did not respond.

There are two matters involving Judge Haynsworth's actions as the administrator of the Fourth Circuit which bear upon his record in civil rights. Judge Haynsworth sat on a panel in August of last year hearing applications for stays of District Court orders in three school desegregation cases arising out of the Eastern District of North Carolina. There the District Court judges, taking seriously the teachings of the Supreme Court, had ordered immediate and substantial compliance with *Green*; the school boards had moved the Fourth Circuit for stays of the orders pending appeal. The effect of a stay in each case would have been to delay school desegregation for at least another year. Stays had been denied by the District Courts, but the Fourth Circuit granted stays in two of the cases. The plaintiffs immediately made application to Justice Black who thereupon vacated the stays. *Boomer* v. *Beaufort County Board of Education* and *Felton* v. *Edenton-Chowan Board of Education*, September 3, 1968. It is significant, we think, that in both cases the appeals were thereafter withdrawn and the schools were desegregated.

This year, plaintiffs in three other cases in North Carolina appealed from decisions where other District Judges had either permitted delay or denied

relief outright. The case of *Nesbitt* v. *Statesville City Board of Education* was argued on June 13, 1969 before a panel including Judge Haynsworth. On July 8, 1969, plaiutiffs were informed by the Clerk that the case had been set for reargument *en banc*, together with *Ziglar* v. *Reidsville City Board of Education* and *Thompson* v. *Durham County Board of Education*. In both *Ziglar* and *Thompson*, the plaintiffs had moved alternatively for an expedited appeal or for an injunction pending appeal so that relief could be had in time for the opening of this school term. *Ziglar* was ready for argument on the merits on June 28, 1969; *Thompson*, on July 15, 1969. There was sufficient time for the Court to determine whether there would be another year of segregated schools in Statesville, Reidsville aud Durham County, but the cases will not be heard until October. The failure of the Court to hear these appeals in time for relief to be had rests squarely upon the shoulders of the Chief Judge. Justice Black said less than two weeks ago "that there is no longer the slightest excuse, reason or justification for further postponement of the time when every public school system in the United States will be a unitary one, receiving and teaching studeuts without discrimination on the basis of their race or color." *Alexander* v. *Holmes County Board of Education*, September 5, 1969. Justice Black was simply restating what is clear to anyone who cares to read what the Supreme Court has written, but apparently has not yet become clear to Judge Haynsworth.

Judge Haynsworth has shown an unwillingness to assume his responsibilities to ensure that what the Supreme Court has said must be done is done in fact. We, as black lawyers, strongly urge that the United States Senate turn down his uomination to the United States Supreme Court. This body has a constitutional obligation to ensure that the rights of black Americans are secured. Your decision on this nomination bears directly upon that responsibility.

We thank you for this opportuuity to appear.

STATEMENT BY CARL J. MEGEL, AMERICAN FEDERATION OF TEACHERS, AFL–CIO

Mr. Chairman and members of the committee, my name is Carl J. Megel. I am the Director of Legislation for the American Federation of Teachers, a national organization affiliated with the AFL–CIO and consisting of more than 170,000 classroom teachers.

The purpose of this statement is to express opposition on behalf of the Americau Federation of Teachers to the appointment of Judge Clement Haynsworth, Jr. to the Supreme Court of the United States.

Our opposition is strengthened by the following resolution which was passed by a unanimous vote of the convention of the American Federation of Teachers meeting in New Orleans, Louisiana on Friday, August 22, 1969:

"Whereas, it is knowu that Judge Clement Haynsworth has consistently taken a reactionary stand on all civil rights issues, and

"Whereas, his judicial anti-labor opinions have five times been reversed by the Supreme Court of the United States, and

"Whereas, Mr. George Meany, President of the AFL–CIO, and Mr. Roy Wilkins, Executive Director of the National Association for the Advancement of Colored People, have publicly opposed President's Nixon's nomination of Judge Haynsworth to the United States Supreme Court, therefore be it

"*Resolved*, that the American Federation of Teachers joins with other concerned citizeus in opposing the nomination of Judge Haynsworth to the United States Supreme Court, and be it finally

"*Resolved*, that this position be made known to the general public, to President Nixon, and to all United States Senators."

Additionally, the Americau Federation of Teachers will not support the appointment of a judge to the Supreme Court of the United States who finds no infringement of "Constitutional Rights" in the closing of the public schools in Prince Edward County, Virginia and in the use of state funds for maintenance of private segregated schools.

The above allegations, without reference to "conflict of interest" charges, are of sufficient completeness to support our opposition to the appointment of Judge Clement Haynsworth to the United States Supreme Court.

STATEMENT BY LOUIS STULBERG, PRESIDENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, ON NOMINATION OF JUDGE CLEMENT HAYNSWORTH, JR.

The International Ladies' Garment Workers' Union of America, AFL–CIO, opposes the nomination of Judge Clement F. Haynsworth, Jr., to the Supreme Court of the United States.

In doing so, it joins with such organizations as the American Federation of Labor and Congress of Industrial Organizations and the Civil Rights Leadership Conference in its charges that Judge Haynsworth's anti-civil rights predilection and anti-labor bias indicate an insensitivity to the rights and needs of America's minorities and workingmen.

As further alleged, Judge Haynsworth's record questions his integrity as a jurist and in at least one case points to a violation of the canons of Judicial ethics.

His insensitivity to the rights of minority groups in America is shown by the fact that Judge Haynsworth sided with the forces of prejudice in school integration cases and in at least one case dealing with federal assistance to minorities.

We should like to point out that in a majority of such decisions, the opinions of the Fourth Circuit Court, of which Judge Haynsworth is a member, have been reversed by the United States Supreme Court. It may be worth noting that these reversals have had the support of moderates and conservatives of the Court as well as of its liberal members.

We respectfully urge that Judge Haynsworth's decision be examined in the case involving the attempt of Prince Edward County in Virginia to thwart school desegregation by abolishing public schools. His aid and comfort to the friends of segregation in the schools is obvious also in "freedom of choice" suits and school transfer plans—both developed to slow down school desegregation.

The Senate Judiciary Committee and the members of the Senate might also be interested in his decision opposing the efforts by Negroes to win their rights in a federally assisted hospital battle.

The case against Judge Haynsworth's failure to accept the statutes dealing with the rights of workers to organize and bargain collectively is equally obvious.

In decision after decision, his vote in the Fourth Circuit Court has sided with anti-union employers against workers. Ten labor cases in which Judge Haynsworth participated have been reviewed by the Supreme Court. In all ten, Judge Haynsworth took the employer position. In all ten, the Supreme Court reversed, generally unanimously, with liberal, moderate and conservative Justices joining in the reversal.

There are some men in the Senate and elsewhere who, although opposed to Judge Haynsworth's position on civil rights and worker rights, may be persuaded that it is the prerogative of the President to name whomsoever he pleases to the highest Court of the land. While this would be questioned by the International Ladies' Garment Workers' Union, such argument is conceivably admissible.

However, Judge Haynsworth's participation in the anti-union Deering-Milliken Company's Darlington, South Carolina mills case is, we believe, a horse of a different color.

No matter how the Administration, both through the White House and the Justice Department, attempts to argue it away, there is a grave question of Judicial ethics involved.

It must be kept in mind that Judge Haynsworth and his former law firm have intimate connections with the textile industry and participated in bringing that industry to the South. Their business and social relations have been close. Indeed, Judge Haynsworth and his firm represented one of the Deering-Milliken affiliates, Judson Mill. Even the fact that he is no longer an active member of the firm cannot wipe out the very great possibility that former relationships and continuing social contacts must cause some suspicion that the Judge cannot be absolutely impartial.

This question of Judicial ethical conduct is particularly a matter of importance in the Deering-Milliken, Darlington case where Deering-Milliken closed down the plant and threw 500 workers out of work because they had voted for representation by the Textile Workers Union.

In 1963, in a 3 to 2 decision, Judge Haynsworth voted to uphold Deering-Milliken's absolute right to close down the Darlington plant.

It should be noted here that in major part this decision was unanimously reversed by the Supreme Court.

At the time Judge Haynsworth was hearing the case, the Textile Workers Union was not aware that he was involved with a vending company (of which he was an officer and a significant stockholder) doing a meaningful business with Deering-Milliken. The Union was not aware that he owned 15% of the stock of the company which depended on Deering-Milliken's patronage for part of its profits. He did not sell this stock even though he was sitting on the case when his vote would decide in favor of Deering-Milliken. At the time the case was argued in May 1963, his company was receiving $50,000 a year in business from Deering-Milliken. Following the argument and before the case was decided, it received another $50,000 a year in business from Deering-Milliken. Thus, at the time the 3 to 2 decision was made in November of 1963, his vending company was receiving $100,000 a year in business from Deering-Milliken.

In April 1964, the vending company was sold to a larger corporation. For the $1,800 original investment he had in the vending company, Judge Haynsworth received stock which, six months after the decision, he sold for about $450,000.

During the whole proceeding involving the Textile Workers Union and Deering-Milliken in the Darlington case, Judge Haynsworth never suggested that he should disqualify himself. It is interesting to relate that when the case came for review before the Supreme Court, which reversed Judge Haynsworth's decision unanimously, Justice Arthur Goldberg disqualified himself from the review because he had once served as Counsel for the AFL–CIO and the Textile Workers Union, even though he had never had anything to do with the Darlington case.

Inexcusable, too, in our opinion, is the Administration's attempt to say that Judge Haynsworth has already been cleared of the above charge by Chief Judge Sobeloff and by the Justice Department when Robert Kennedy was Attorney-General. The Sobeloff-Kennedy clearance had to do with an untrue allegation of bribery, and was not in any sense directed to the question of Judicial ethics here involved.

Neither the AFL–CIO nor the Civil Rights Leadership Conference nor the International Ladies' Garment Workers' Union suggests that the earlier charge had any foundation in fact. Our basis for charging Judge Haynsworth with insensitivity to Judicial ethics has to do with his business relationship with Deering Milliken through the vending company of which he was a Vice-President and significant stockholder.

In sum, on the basis of his anti-civil rights position and his anti-labor position and because of questionable Judicial ethical conduct, we urge that you refuse to confirm Judge Clement F. Haynsworth, Jr. to the Supreme Court of the United States.

(Whereupon, at 12:30 p.m., the committee adjourned to reconvene subject to the call of the Chair.)

APPENDIX

Cases and materials submitted by Senator Ervin

DEERING MILLIKEN, INC., a Corporation, Appellee,

v.

Reed JOHNSTON, as Regional Director of the National Labor Relations Board, Appellant.

No. 8375.

United States Court of Appeals Fourth Circuit.

Argued June 12, 1961.

Decided Oct. 13, 1961.

Proceeding to enjoin Regional Director of National Labor Relations Board from proceeding with further hearings ordered by National Labor Relations Board. The United States District Court for the Middle District of North Carolina, at Winston-Salem, Charles Cecil Wyche, J., 193 F.Supp. 741, entered order enjoining further proceedings and the Regional Director appealed. The Court of Appeals, Haynsworth, Circuit Judge, held that trial examiner was improperly prohibited, on second remand order of National Labor Relations Board, from conducting hearing to determine whether alleged corporate controller of employing textile manufacturer, which, shortly after employees held election, discontinued its operations, had been merged into corporation operating textile mills, but examiner was properly prohibited from conducting hearing on unspecific remainder of order that justified fears of lengthy and costly hearings covering ground covered in prior hearing.

Remanded.

1. Administrative Law and Procedure ⇐309

Section of Administrative Procedure Act to effect that every agency shall proceed with reasonable dispatch to conclude any matter presented to it is mandatory. Administrative Procedure Act, §§ 6(a), 10(e) (A), (B) (1, 3), 5 U.S.C.A. §§ 1005(a), 1009(e) (A), (B) (1, 3).

2. Injunction ⇐75

Federal courts may enjoin acts of federal agency in excess of agency's statutory authority, but jurisdiction exists only for protection of statutory rights which Congress intended to be judicially enforceable and for which there is no other adequate administrative or judicial remedy. Administrative Procedure Act, §§ 6(a), 10(e) (A), (B) (1, 3), 5 U.S.C.A. §§ 1005(a), 1009(e) (A), (B) (1, 3).

3. Injunction ⇐74

Courts may prohibit administrative agency action in violation of statutory requirement, if failure of enforcement would defeat apparent congressional purpose. Administrative Procedure Act, §§ 6(a), 10(e) (A), (B) (1, 3), 5 U.S.C.A. §§ 1005(a), 1009(e) (A), (B) (1, 3).

4. Labor Relations ⇐516

Courts must enforce requirement that National Labor Relations Board proceed with reasonable expedition. Administrative Procedure Act, § 10(e), 5 U.S.C.A. § 1009(e); National Labor Relations Act, § 10(e, f) as amended 29 U.S.C.A. § 160(e, f).

5. Labor Relations ⇐511

Section of National Labor Relations Act providing for review of final order of National Labor Relations Board on petition to court did not provide adequate remedy for enforcement of right asserted by employer who complained of Board's delay of proceedings involving alleged unfair labor practice. National Labor Relations Act, § 10(f) as amended 29 U.S.C.A. § 160(f).

6. Administrative Law and Procedure ⇐704

Delay, violating requirement that every agency proceed with reasonable dispatch and amounting to legal wrong within statute to effect that person suffering legal wrong because of any agency action shall be entitled to judicial review, is "final" action within statute to effect that every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Administrative Procedure Act, §§ 6(a),

10(a, c), 5 U.S.C.A. §§ 1005(a), 1009(a, c).

See publication Words and Phrases, for other judicial constructions and definitions of "Final".

7. Administrative Law and Procedure ⇐229

Generally, available administrative remedies must be exhausted before resort to courts.

8. Administrative Law and Procedure ⇐228

Party to proceeding required by statute to be initially tried before administrative tribunal has no right to have issue tried initially in court.

9. Labor Relations ⇐511

District court had jurisdiction of controversy as to whether case involving alleged unfair labor practice should be remanded by National Labor Relations Board to trial examiner for second time. National Labor Relations Act, § 10(f) as amended 29 U.S.C.A. § 160(f); Administrative Procedure Act, § 10(b), 5 U.S.C.A. § 1009(b).

10. Labor Relations ⇐924

Individual members of National Labor Relations Board were not indispensable parties to proceeding to enjoin regional director of Board from proceeding with further hearings ordered by Board.

11. Labor Relations ⇐592

Trial examiner was improperly prohibited, on second remand order of National Labor Relations Board, from conducting hearing to determine whether alleged corporate controller of employing textile manufacturer, which, shortly after employees held election, discontinued its operations, had been merged into corporation operating textile mills, but examiner was properly prohibited from conducting hearing on unspecific remainder of order that justified fears of lengthy and costly hearings covering ground covered in prior hearings. National Labor Relations Act, § 10(f) as amended 29 U.S.C.A. § 160(f); Administrative Procedure Act, § 10(b), 5 U.S.C.A. § 1009(b).

12. Labor Relations ⇐597

National Labor Relations Board, in remanding undecided cases for further hearings, is not restricted by rules governing motions in courts for new trials based upon after-discovered evidence, but employer should not be required to participate in repetitive, purposeless and oppressive supplementary hearings. Administrative Procedure Act, § 6, 5 U.S.C.A. § 1005.

James C. Paras, Atty., National Labor Relations Board, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Marion L. Griffin, Atty., National Labor Relations Board, Washington, D. C., on brief), for appellant.

John R. Schoemer, Jr., New York City, and Thornton H. Brooks, Greensboro, N. C. (McLendon, Brim, Holderness & Brooks, Greensboro, N. C., and Townley, Updike, Carter & Rodgers, New York City, on brief), for appellee.

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

HAYNSWORTH, Circuit Judge.

This appeal is from an order of the District Court for the Middle District of North Carolina entered upon the application of Deering Milliken, Inc., enjoining the Regional Director of the National Labor Relations Board from proceeding with certain further hearings ordered by the Board. The injunction was predicated upon findings that a second remand order in an unfair labor practice case was in violation of the Board's duty to dispose of the case with reasonable dispatch and was arbitrary and oppressive.

The principal question on appeal is whether the District Court had jurisdiction to enter an injunctive order. We hold it did.

The administrative proceedings began in October 1956 with the filing of a

charge against Darlington Manufacturing Company, alleging that Darlington had committed unfair labor practices when it discontinued its operations and went into liquidation. On the basis of this charge, a complaint was issued by the General Counsel and hearings were had starting in January 1957.

In an Intermediate Report, dated April 30, 1957, the Trial Examiner concluded that there was economic reason for the liquidation, but that it was also motivated by a recent election among Darlington's employees held under the supervision of the Board. He recommended an order finding that Darlington had committed unfair labor practices, but recommending also that because of Darlington's cessation of business, there was no reinstatement remedy.[1]

During the 1957 hearings the Textile Workers Union of America made an offer to prove that Darlington Manufacturing Company was one of a chain of mills controlled by Deering Milliken & Co., Inc., a New York corporation, Darlington's sales representative. This offer of proof was rejected by the Trial Examiner.

On December 16, 1957, the Board, without passing upon the substantive question as to whether Darlington had committed an unfair labor practice, ordered a remand of the case for the purpose of receiving additional evidence along the lines suggested by the union's offer of proof. A majority of the Board thought that the inclusion of such evidence in the record would be desirable before consideration of the substantive issue. Two members of the Board dissented on the ground that the evidence did not bear on the substantive issue.

Preparatory to the hearings on remand, Deering Milliken & Co., Inc., which had then been made a party to the proceedings, made available for inspection by the General Counsel some 10,000 pages of records and documents, of which the General Counsel selected some 2600 pages for further analysis and possible use. At the further hearings some fourteen witnesses testified. Over 400 pages of exhibits were introduced, and over 2500 pages of testimony were taken. The preparation of one of these exhibits, at the request of the General Counsel of the Board, is alleged to have required nearly 400 man-hours of work by employees of Deering Milliken & Co., Inc.

During the remand hearings, extensive evidence was taken as to the relationship between Deering Milliken & Co., Inc. and Darlington, and there was frequent reference to other corporations alleged by the union to be members of a chain, of which Deering Milliken & Co., Inc. and Darlington were members. The proof showed that individual members of the Milliken family owned in the aggregate a majority of the stock of Deering Milliken & Co., Inc., of Darlington, and of certain other corporations, particularly The Cotwool Manufacturing Corporation, which owned and operated a number of textile manufacturing plants and which had subsidiary corporations owning and operating other textile manufacturing plants. The evidence discloses that the Millikens were not the only stockholders of these corporations, but it clearly establishes that, through ownership of a majority of the stock of each, they, as a group, exercised effective control of each of them. It also clearly establishes the fact, however, that Deering Milliken & Co., Inc. was itself engaged in no manufacturing operations, but was the sales representative of each of the manufacturing corporations controlled by members of the Milliken family through ownership of a majority of the outstanding stock.

1. Darlington's manufacturing operations had been completely discontinued, but the distribution of its assets in liquidation had not been completed. By a consent order, further distributions in liquidation to its stockholders were postponed, pending a final disposition of these proceedings. Darlington has assets available for the satisfaction of any back-pay award amounting to several hundred thousand dollars. In view of the long lapse of time, however, if all of the former employees of Darlington are entitled to back-pay for net wage losses from 1950 to the present time, the total award might exceed Darlington's remaining assets.

At the conclusion of the remand hearings, the General Counsel's representative requested that the record be held open in order that he might review the evidence with his superiors to be certain that enough of the available evidence to support the union's theory of a unitary organization had been offered. The request was granted and the record was held open for the requested period of time, but thereafter the hearings were closed without any effort on the part of the General Counsel or of the union to offer additional or supplemental evidence.

On December 31, 1959, the Trial Examiner filed a Supplemental Intermediate Report. This report examines in detail the relationship between Deering Milliken & Co., Inc. and Darlington. There is also in it much about the relationship of Deering Milliken & Co., Inc. and the other manufacturing corporations.

The Supplemental Intermediate Report concluded with a finding that Deering Milliken & Co., Inc. did not occupy a single employer status with Darlington and recommended dismissal of the complaint as to Deering Milliken & Co., Inc. The Supplemental Intermediate Report contains much language suggesting that, in the opinion of the Trial Examiner, much time and effort had been fruitlessly expended. Among other things, he stated in the report, "We have indeed labored but have brought forth not even a mouse." He expressed the opinion it was not "even remotely possible that employment [of former employees of Darlington] in the other mills will be directed."

Upon exceptions to the Supplemental Intermediate Report and the briefs of the parties, the case again came before the Board for decision in early 1960, more than two years after its first remand order. Nothing further was done, however, until January 9, 1961, when the union filed a motion to reopen the case and it was again remanded to the Trial Examiner for further hearings, again with two members of the Board dissenting.

The motion for another remand was based upon newspaper articles published in December 1960, which, the motion asserted, contained newly discovered evidence. These articles announced that Deering Milliken, Inc. had appointed a president of each of its three manufacturing divisions, its fine goods division, its worsted division, and its woolen division.[2] The affidavit accompanying the union's motion suggested that the announcement was inconsistent with the earlier contention of Deering Milliken & Co., Inc. that it was not engaged in manufacturing operations. The apparent inconsistency was emphasized by the fact that the newspaper articles listed the particular mills in each of the three divisions, many of which were referred to in the record made in the hearings on the first remand and which the Trial Examiner had found were not shown to have been controlled by Deering Milliken & Co., Inc.

In opposition to the motion to again reopen the case and remand it for a second time, an affidavit was filed in which it was stated that in June 1960 Deering Milliken & Co., Inc., the New York corporation which had been a party to these proceedings, had been merged into The Cotwool Manufacturing Corporation, a Delaware corporation, and that Cotwool's name had thereupon been changed to Deering Milliken, Inc. The record, of course, shows that Cotwool, controlled by the Milliken family through majority stock ownership, was extensively engaged in the textile manufacturing business in 1956, and the affidavit indicates it was still so engaged in 1960. In opposition to the motion to again reopen the case, it was contended that Cotwool's (now Deering Milliken, Inc.) appointment of executives of its manufacturing divisions was irrelevant to the question of whether the old sales corporation, Deering Milliken & Co., Inc., in 1956 controlled the manufacturing operations and labor policies of the mills for which it acted as sales representative.

2. A print cloth mill, such as Darlington was would not fall in any of these classifications.

Though the case had been then pending for many months before the Board for a decision on the substantive question, whether an unfair labor practice had been committed by Darlington, and though there had been a previous remand leading to prolonged and extensive hearings on the supplemental question of possible remedies in the event an unfair labor practice should be found to have been committed,[3] the Board again remanded the case for further hearings and testimony on the supplemental question of possible remedies. The remand is in broad terms, being:

> "* * * for the purpose of taking newly discovered testimony and evidence relating to (1) the Deering, Milliken & Co., Inc. press release referred to in the aforesaid Affidavit, (2) the responsibility of Deering, Milliken & Co., Inc., either for the unfair labor practices of Darlington Manufacturing Company or to remedy those unfair labor practices and (3) such further evidence as may be deemed proper and appropriate under the circumstances."

Deering Milliken, Inc. then brought this action in the District Court seeking an injunction against the Regional Director of the Board to prohibit his holding further hearings pursuant to the second remand order. The District Court granted the injunction,[4] holding that except to the extent the hearings on remand were directed to the 1960 press release relating to the appointment of executives of divisions of the manufacturing company, the new hearings were directed to the same ground and for the same purpose as the extensive hearings on the previous remand, and that, to the extent of the exception, what the Delaware manufacturing corporation did in 1960 was entirely irrelevant to the control of manufacturing operations exercised by the New York sales corporation in 1956. The District Court was of the opinion that additional hearings on remand were purposeless and oppressive, and the remand order invalid.

The Board challenges the jurisdiction of the District Court to pass such an order and maintains that this is an indirect effort to obtain review in that court of an interlocutory Board action which the law makes ultimately reviewable only in the Court of Appeals after a final order.

The plaintiff, on the other hand, contends that this is not an effort to obtain "review" of the Board's action in the sense that that word is used in § 10(f) of the National Labor Relations Act, as amended.[5] Rather, it is a proceeding to enforce an obligatory provision of the Administrative Procedure Act in the manner authorized by that statute.

[1] In § 6(a) of the Administrative Procedure Act,[6] it is specifically provided:

> "* * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for

3. The substantive question, of course, is not before us. We are not prepared to, and do not, intimate any opinion upon it. If Darlington's conduct was plainly a violation of the Act, however, extensive hearings on the subject of available remedies prior to a formal declaration of an obvious violation would have greater justification. From all that presently appears, however, it is uncertain that the Board will ever conclude that Darlington committed an unfair labor practice. Such cases as Jays Foods, Inc. v. N. L. R. B., 7 Cir., 292 F.2d 317 indicate that a company does not violate the Act when it goes out of business, though the termination of its business is motivated in part by the organizational activities of employees. We do not suggest that we think the principle is valid or, if generally valid, necessarily applicable to the facts of this case. Those are questions for initial consideration by the Board. All that we suggest is that, on this record, the substantive question of the commission of an unfair labor practice by Darlington does not appear to be undebatable.

4. Deering Milliken, Inc. v. Johnston, D.C. M.D.N.C., 193 F.Supp. 741.

5. 29 U.S.C.A. § 160(f).

6. 5 U.S.C.A. § 1005(a).

the convenience and necessity of the parties or their representatives. * * *"

This is no precatory declaration. It is an enforceable command, made expressly so by § 10(e) of the Administrative Procedure Act,[7] which provides that the court "shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * *; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; * * *."

[2] The jurisdiction of the federal courts to enjoin acts of a federal administrative agency in excess of the agency's statutory authority was recognized as early as 1902.[8] This recognition of the jurisdiction of the federal courts has carried through a long line of cases to the present time.[9] As a corollary of that

7. 5 U.S.C.A. § 1009(e).

8. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90. As early as 1803, the Supreme Court, in Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60, had held that the courts had jurisdiction and power to issue an appropriate common law writ to compel a cabinet officer to perform a duty prescribed by the Constitution, though there was no provision for judicial enforcement of performance of the officer's duty. Generally, in the 19th century, however, there was judicial reluctance to recognize a right of judicial review of administrative action. Professor Davis suggests this reluctance may have been attributable to the fact that the concept of review restricted in scope had not been then developed. In any event, the McAnnulty case in 1902 is generally regarded as the first and leading exposition of the more modern approach to the jurisdictional question. See the cases cited in footnote 9, infra, in which the principle of the McAnnulty case is further developed and elaborated. See, generally, Davis, Unreviewable Administrative Action, 1954, 15 F.R.D. 411, 416; Jaffe, The Right to Judicial Review, 71 Harv.L.Rev. 401, 423 (1958). It has been suggested that there exists a presumptive right of judicial review of administrative action. Davis, id., Jaffe, id. Accord, United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451; Heikkila v. Barber, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972; Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503; Union Pacific Railroad Co. v. Price, 360 U.S. 601, 616, 79 S.Ct. [illegible] 5 L.Ed.2d 1340 (dissenting opinion of Mr. Justice Douglas); Schilling v. Rogers, 363 U.S. 666, 677–678, 80 S.Ct. 1288, 4 L.Ed.2d 1478 (dissenting opinion of Mr. Justice Brennan); and see Administrative Procedure Act, Legislative History, S.Doc. No. 248, 79th Cong., 2 Sess., 275. Contra: Mr. Justice Frankfurter, dissenting, Stark v. Wickard, 321 U.S. 288, 311–315, 64 S.Ct. 559, 88 L.Ed. 733. Here, however, there is no need to resort to presumptions, for there is clear expression of congressional intention in the Administrative Procedure Act.

9. Noble v. Union River Logging Railroad Company, 147 U.S. 165, 13 S.Ct. 271, 37 L.Ed. 123; American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90; Interstate Commerce Commission v. Northern Pacific Railway Company, 216 U.S. 538, 30 S.Ct. 417, 54 L.Ed. 608; Philadelphia Company v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570; Crowell v. Benson, 285 U.S. 22, 54–65, 52 S.Ct. 285, 76 L.Ed. 598; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 52–59, 56 S.Ct. 720, 80 L.Ed. 1033; United States v. State of Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070; Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288; Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 183, et seq., 59 S.Ct. 160, 83 L.Ed. 111; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59–60, 59 S.Ct. 409, 83 L.Ed. 483; American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (dictum); Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 306, 64 S.Ct. 95, 88 L.Ed. 61 (dictum); Stark v. Wickard, 321 U.S. 288, 306, et seq., 64 S.Ct. 559, 88 L.Ed. 733; Inland Empire District Council, Lumber & Sawmill Workers Union v. Millis, 325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877; Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441, 67 S.Ct. 411, 91 L.Ed. 408; United Public Workers of America v. Mitchell, 330 U.S. 75, 93, 67 S.Ct. 556, 91 L.Ed. 754; Williams v. Fanning, 332 U.S. 490, 68 S.Ct. 188, 92 L.Ed. 95; Hynes v. Grimes Packing Co., 337 U.S.

doctrine,[10] it has long been recognized that a federal court, upon complaint of an injured party, has jurisdiction to compel administrative action wrongfully withheld in violation of a statutory duty to act.[11]

This jurisdiction of the federal courts, of course, is not absolute. It exists only for the protection of those statutory rights which Congress intended to be judicially enforceable,[12] and for which there is no other adequate administrative or judicial remedy.[13]

[3] Whether or not the Congress intended judicial enforcement of a particular statutory command is not conclusively answered by the absence of any specific statutory remedy.[14] The courts have al-

86, 90, 69 S.Ct. 968, 93 L.Ed. 1231; United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451; Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817; Radio Corporation of America v. United States, 341 U.S. 412, 422–423, 71 S.Ct. 806, 95 L.Ed. 1062; Riss & Co., Inc. v. United States, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345, reversing per curiam D.C., 90 F.Supp. 452; and see United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S.Ct. 67, 97 L.Ed. 54; Brannan v. Stark, 342 U.S. 451, 72 S.Ct. 433, 96 L.Ed. 497; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153; Heikkila v. Barber, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972; Rubinstein v. Brownell, 346 U.S. 929, 74 S.Ct. 310, 98 L.Ed. 421, affirming by an equally divided court, 92 U.S.App. D.C. 328, 206 F.2d 449; Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868; Whitehouse v. Illinois Central Railroad Co., 349 U.S. 366, 75 S.Ct. 845, 99 L.Ed. 1155; Leedom v. International Union of Mine, Mill & Smelter Workers, 352 U.S. 145, 77 S.Ct. 154, 1 L.Ed.2d 201; Brownell v. We Shung, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225; Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Schilling v. Rogers, 363 U.S. 666, 676–678, 80 S.Ct. 1288, 4 L.Ed.2d 1478.

10. Noble v. Union River Logging Railroad Company, 147 U.S. 165, 13 S.Ct. 271, 37 L.Ed. 123.

11. Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60; Kendall v. United States ex rel. Stokes, 12 Pet. 524, 608, 37 U.S. 524, 608, 9 L.Ed. 1181; United States v. Schurz, 12 Otto 378, 102 U.S. 378, 26 L.Ed. 167; Roberts v. United States, 176 U.S. 221, 20 S.Ct. 376, 44 L.Ed. 443; Garfield v. People ex rel. Goldsby, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168; Interstate Commerce Commission v. United States ex rel. Humbolt Steamship Company, 224 U.S. 474, 484–485, 32 S.Ct. 550, 56 L.Ed. 840; Lane v. Hoglund, 244 U.S. 174, 37 S.Ct. 558, 61 L.Ed. 1060; United States ex rel. Louisville Cement Company v. Interstate Commerce Commission, 246 U.S. 638, 38 S.Ct. 408, 62 L.Ed. 914; Kansas City Southern Railway Company v. Interstate Commerce Commission, 252 U.S. 178, 40 S.Ct. 187, 64 L.Ed. 517; Work v. United States ex rel. Rives, 267 U.S. 175, 45 S.Ct. 252, 69 L.Ed. 561; Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S.Ct. 320, 74 L.Ed. 809; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 650; Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403; Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503; Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 318, 78 S.Ct. 752, 2 L.Ed.2d 788.

12. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733.

13. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733; Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 300, 64 S.Ct. 95, 88 L.Ed. 61 (dictum); American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (dictum); Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483; Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90.

14. Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503; Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403; Brownell v. We Shung, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed.2d 225; Leedom v. International Union of Mine, Mill & Smelter Workers, 352 U.S. 145, 77 S.Ct. 154, 1 L.Ed.2d 201; Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868; Rubinstein v. Brownell, 346 U.S. 929, 74 S.

ways been able to fashion remedies to prohibit agency action in violation of a statutory requirement, if a failure of enforcement would occasion a defeat of the apparent congressional purpose.[15]

The explicit provision of § 10(e) of the Administrative Procedure Act, that the courts shall compel agency action unlawfully withheld or unreasonably delayed, is an affirmative statutory declaration of the congressional purpose that the requirement in § 6 of that Act, that agency action be concluded with reasonable dispatch, gives rise to legally enforceable rights of the parties to the proceeding. Its formally declared intention is fully supported by the legislative history. The committee report in the Senate[16] said that the requirement that agencies proceed with reasonable dispatch to conclude the matter presented is a "legal requirement" that an agency shall not deny relief or fail to conclude a case by mere inaction. Of the same requirement, the report of the committee in the House[17] says that no agency "shall in effect deny relief or fail to conclude a case by mere inaction, or proceed in a dilatory fashion to the injury of the person concerned. No agency should permit any person to suffer injurious consequences upon unwarranted official delay."

Senator McCarran, the author of the bill which became the Administrative Procedure Act, on the floor of the Senate explained that the bill conferred no administrative powers, but provided definitions of, and limitations upon, administrative action, to be interpreted and applied by the agencies in the first instance, but to be enforced by the courts in the final analysis.[18] In answer to a specific question from the floor, Senator McCarran replied that it was the intention of the bill, in the absence of any other adequate, available remedy, to give a party injured by a violation of one of the terms of the bill, the right of enforcement by the extraordinary remedies of injunction, prohibition and quo warranto.

[4] We conclude that, under § 10(e) of the Administrative Procedure Act, the courts have the right and the duty

Ct. 310, 98 L.Ed. 421; Heikkila v. Barber, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972; Riss & Co., Inc. v. United States, 341 U.S. 907, 71 S.Ct. 620, 95 L.Ed. 1345; United States v. Interstate Commerce Commission, 337 U.S. 426, 69 S.Ct. 1410, 93 L.Ed. 1451; Hynes v. Grimes Packing Co., 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231; Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441, 67 S.Ct. 411, 91 L.Ed. 408; Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733; American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483; Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 568–570, 50 S.Ct. 427, 74 L.Ed. 1034; United States ex rel. Kansas City Southern Railway Company v. Interstate Commerce Commission, 352 U.S. 178, 40 S.Ct. 187, 64 L.Ed. 517; United States ex rel. Louisville Cement Company v. Interstate Commerce Commission, 246 U.S. 638, 38 S.Ct. 408, 62 L.Ed. 914; Interstate Commerce Commission v. United States ex rel. Humbolt Steamship Company, 224 U.S. 474, 32 S.Ct. 556, 56 L.Ed. 849.

15. Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 568–570, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733.

16. Administrative Procedure Act, Legislative History, S.Doc. No. 248, 79th Cong., 2d Sess., 204–205.

17. Legislative History, 263–264.

18. Legislative History, 320–327, 217, 278–279, 281–282.

to enforce the Act's requirement that the Board proceed with reasonable expedition.

The Board contends, however, that the provisions of § 10(e) and (f) of the National Labor Relations Act provide methods of reviewing final orders of the Board which are exclusive. The existence of the particular method of review is said to foreclose resort to the general jurisdiction of the district courts.

This contention has validity only so long as the particularized method of review is adequate for the protection of the asserted statutory right. The case would present no problem if review of Board action under § 10(f) of the National Labor Relations Act was adequate and appropriate for enforcement of the plaintiff's right to have the Board conclude these proceedings with reasonable dispatch. The Administrative Procedure Act in § 10(b) specifically provides that other remedies are available only when a "special statutory review proceeding" is not available or is inadequate. If the § 10(f) proceeding under the National Labor Relations Act is inadequate to protect the plaintiff's right, however, the district court had jurisdiction to enforce the right.

In Leedom v. Kyne, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210, the Supreme Court held that review proceedings under the National Labor Relations Act were inadequate for the protection of the right of professional employees to have nonprofessional employees excluded from their bargaining unit.[19] Upon that premise, the Supreme Court clearly held that the professional employees, through their representative, properly invoked the jurisdiction of the district court for the vindication of the right Congress had conferred upon them.

The decision in Leedom v. Kyne was foreshadowed by what was said in American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 405, 412, 60 S.Ct. 300, 84 L.Ed. 347, and in Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 300, 64 S.Ct. 95, 88 L.Ed. 61.[20] In each of those cases, the Court was careful to distinguish its holding from a case in which a statutory right could not be adequately enforced by a particular method of review provided with respect to the decisions of the agency involved. The situation which was reserved and excepted in those two cases, confronted the Court in Leedom v. Kyne. It is the same situation which meets us here. Our conclusion is controlled by Leedom v. Kyne.

[5] We think that § 10(f) of the National Labor Relations Act does not provide an adequate remedy for enforcement of the right asserted here. The delay of which the plaintiff complains is not an order granting or denying relief within the meaning of that section. There is no right of review under § 10(f) of the National Labor Relations Act until the Board finally shall have acted upon the merits of the case and entered a final order granting or denying relief. There can be no review under § 10(f) of the National Labor Relations Act until the delay of which the plaintiff complains shall have come to a final end by reason of the Board's own volition. Should the Board neglect to act for years yet to come, the plaintiff could not seek an end to the delay through a proceeding under § 10(f) of the National Labor Relations Act. Enforcement of the right to have the proceeding brought to a conclusion with reasonable dispatch requires the availability of a remedy at a time when the court's order can bear upon the delay and bring it to a conclusion before the erring agency chooses to terminate its own default in the performance of its statutory duty.

19. Review of the bargaining unit determination under the National Labor Relations Act was not entirely unavailable to the protesting professional employees, see note on Leedom v. Kyne, 73 Harv. L.Rev. 84, 219, though such review may have been inadequate.

20. See Inland Empire District Council, Lumber & Sawmill Workers Union, Lewiston, Idaho v. Millis, 325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877.

In the particular context of this case, the Board says that a court in a proceeding under § 10(f) of the National Labor Relations Act could relieve the plaintiff of the legal burden of the delay, if unreasonable delay were found to have occurred, by excluding from consideration all evidence taken in hearings pursuant to the second remand order. The plaintiff, however, asserts no right to the exclusion of relevant evidence. The right it asserts is to have the proceeding brought to a conclusion with reasonable promptness. Its attack upon the second remand order is essentially that the remand is the means by which further delay will be accomplished without any material addition to the records previously made in the original hearings and upon the first remand. If, as the plaintiff contends, extensive hearings on the second remand can produce no material evidence not already of record, exclusion from consideration of irrelevant and cumulative evidence in a proceeding under § 10(f) of the National Labor Relations Act would be a futile sanction by which to procure enforcement of the Board's duty to act without unreasonable delay.

For enforcement of the plaintiff's right under § 6 of the Administrative Procedure Act, a proceeding under § 10(f) of the National Labor Relations Act is at least as inappropriate as it was to the protection of the rights of the professional employees in Leedom v. Kyne. Here, as there, this is not an action to "review" a decision of the Board made in the exercise of its jurisdiction. It is, instead, an action to prohibit Board violation of a prohibition of the Administrative Procedure Act.

The Board next contends that under the Administrative Procedure Act, interlocutory and procedural acts of the Board are not subject to review, except in connection with the review of a board order determining the rights of the parties. Indeed, § 10(c) of that Act does make reviewable "every final agency action for which there is no other adequate remedy in any court * * *." That Section further provides that preliminary, procedural or intermediate agency action, not directly reviewable, may be reviewed in connection with the review of a final order.

[6] The "final agency action" made reviewable under § 10(c) of the Administrative Procedure Act need not necessarily be read as synonymous with "a final order of the Board granting or denying in whole or in part the relief sought * * *" made reviewable under § 10(f) of the National Labor Relations Act. "'Finality' is not * * * a principle inflexibly applied."[21] Delay, so long as it continues and so long as there is any vestige of a right which will suffer further impairment by an extension of the delay, may not be final in the usual sense of that word, but when it amounts to a violation of § 6(a) of the Administrative Procedure Act and to a legal wrong within the meaning of § 10(a) of that Act, it is final action within the meaning of § 10(c).

The Committees on the Judiciary of both the House and the Senate included in their reports[22] a statement that "'final' action includes any effective agency action for which there is no other adequate remedy in any court." It is true that no such definition of "final action" was included in the Act, itself, but the provision of § 10(e) authorizing the courts to compel agency action unreasonably delayed, makes it plain that the word was used in that sense in § 10(c). If there were no right of review until the agency finally terminated the proceeding before it, a court could never take the action authorized in § 10(e). We thus construe "final action" as used in § 10(c) of the Administrative Procedure Act, in the

21. Mr. Justice Frankfurter concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 156, 71 S.Ct. 624, 640, 95 L.Ed. 817. See, also, his discussion of the varying senses in which the word "final" is employed, footnote 4, p. 154 of 341 U.S., at page 639 of 71 S. Ct. And see Heikkila v. Barber, 345 U.S. 229, 233, 73 S.Ct. 603, 97 L.Ed. 972.

22. Legislative History, 213, 277.

light of the provisions of §§ 10(a) and 10(e), to mean what the Committees said it meant. When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, the delay is final agency action for which § 10 of the Administrative Procedure Act does provide an effective remedy.[23]

[7, 8] Though the Board relies heavily on Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638, and frames much of its argument in terms of the exhaustion of remedies doctrine, there is no such problem here. It is well established, of course, that available administrative remedies must generally be exhausted before resort to the courts. When the Congress has created an administrative tribunal and has provided that certain issues should be initially triable in proceedings conducted before that tribunal, a party to such a proceeding has no right to ignore it and have the issue tried initially in a district court. Myers v. Bethlehem Shipbuilding Corp. is a typical application of the doctrine.

Here, however, there is no available administrative remedy. If hearings are held before a trial examiner pursuant to the second remand order, the plaintiff will have no right to attack there the propriety of the Board's action in again remanding the case. Nor will it there have any effective right to assert its contention that the second remand order and the holding of extended additional hearings pursuant to it constitute a present denial of its rights under § 6 of the Administrative Procedure Act. Indeed, the Board does not here contend that there is any administrative remedy available to the plaintiff for the protection of the right asserted. It contends only that the right may be ultimately asserted, after the delay is done, in a review proceeding under §§ 10(e) or (f) of the National Labor Relations Act. Those are judicial remedies which we have already found inadequate for the protection of the asserted right, and for that reason, their existence does not foreclose invocation of the general jurisdiction of the district court.

[9] We conclude, therefore, that the District Court had jurisdiction of this controversy and that the plaintiff was not precluded from turning to that court for the protection of its right, since there was no available administrative remedy to make applicable the principle requiring prior exhaustion of such remedies.

It is next contended by the defendant, that the individual members of the Board are indispensable parties. Under § 5 of the National Labor Relations Act, 29 U.S.C.A. § 155, the individual members have an official residence in the District of Columbia, where they may be sued. They were not within the territorial jurisdiction of the Middle District of North Carolina and the plaintiff has made no attempt to make them formal parties to this action.

The Board, however, had remanded this case to its Regional Director, the defendant in this action. While he acts under the Board's direction, it is he who, unless effectively enjoined by the Court, will schedule and arrange for the conduct of the hearings of which the plaintiff complains.

It is true that in this action the court could not affirmatively order individual members of the Board to proceed without further hearings or further delay to decide the case on the merits. The plaintiff's theory, however, is that the occasion for the delay and the cause of its indefinite continuance into the future is the pendency of the further hearings under the Board's second remand order. If the cause of the delay is removed, this Court assumes, as apparently does the plaintiff, that the Board will not neglect

23. In Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 274 F.2d 704, 802, the court had no difficulty in concluding that the requirement that an agency proceed with reasonable dispatch was enforceable in a District Court by a mandatory injunction. See, also, Dolcin Corp. v. Federal Trade Commission, 94 U.S.App. D.C. 247, 219 F.2d 742, 746.

its duty to exercise with reasonable dispatch its powers of decision. Presently the pendency of the additional hearings is an obstacle to the Board's conclusion of the proceeding without further undue delay. Removal of that obstacle is all that the plaintiff seeks in this action.

[10] The superior officers, the individual members of the Board, would be indispensable parties here only if the decree undertook to require them to act to bring these proceedings to a conclusion. The decree operates only on the Regional Director, a subordinate officer. By its operation upon the Regional Director, the decree may be made fully effective to remove the present cause of continuing delay in the disposition of the proceeding. Since the relief the plaintiff seeks and the decree of the court require nothing affirmatively of the members of the Board, it is well settled that they are not indispensable parties. Williams v. Fanning, 332 U.S. 490, 68 S.Ct. 188, 92 L.Ed 95; Hynes v. Grimes Packing Co., 337 U.S. 86, 69 S.Ct. 968, 93 L.Ed. 1231.

[11] Finally, we think the facts justify the finding of the District Court that the second remand order will cause unreasonable delay and that its injunctive order was justified by the facts insofar as it prohibits a retrial of the supplemental question so extensively retried as a result of the first remand order.

The administrative proceedings approach their fifth anniversary. The charge which put the Board's processes in motion was filed in October 1956. The case proceeded without unreasonable delay to a hearing on the substantive issue and to the completion of the Intermediate Report, which was filed on April 30, 1957, approximately six months after the filing of the charge. In the more than four years which have since intervened, the only activity in the proceeding has been concerned with the supplemental question of the availability of specific remedies. Over two years elapsed between the date of the first remand order on December 16, 1957 and the filing of the Supplemental Intermediate Report on December 31, 1959.[24] When, however, the majority of the Board again remanded the case on January 9, 1961, more than three years after its first remand order, it necessarily postponed its coming to grips with the issue before it until, after further hearings, another Supplemental Intermediate Report should be prepared and filed, and the parties given an opportunity to file exceptions to the Second Supplemental Intermediate Report and prepare and file arguments with the Board. If there should be a retrial of the supplemental issue already tried pursuant to the first order of remand, as the second remand order apparently contemplates, ultimate decision is postponed by the second remand order, for many months if not for many years. It is this prospective delay of which the plaintiff complains and which justified the District Court's finding that the Board's remand order was a violation of its duty to proceed with reasonable dispatch to conclude the proceedings.

There are no absolute standards by which it may be determined whether a proceeding is being advanced with reasonable dispatch. What is reasonable can be decided only in the light of the nature of the proceedings and the general and specific problems of the agency in discharging its functions and duties. Everyone cannot be given prompt and immediate hearings by an administrative tribunal which has a caseload beyond its capacity to process promptly. Statements of officials of the Board before the Subcommittee of the House Labor Com-

24. Apparently most of this two-year period was expended in preparation for the hearing required by the Board's remand order, and in the conduct of the actual hearing. The Supplemental Intermediate Report was completed by the Trial Examiner and filed within a reasonable time after the record of those hearings was finally closed. It is not suggested that the Trial Examiner or any other official was dilatory in advancing the supplementary proceedings directed by the Board. It is suggested that the supplemental issue was extensively prepared and tried in a protracted hearing during that two-year period.

mittee on May 8, 1961, Part 2 of CCH Labor Law Reports No. 45 May 18, 1961, disclose the great increase in the caseload and the consequent difficulties which confront the Board in keeping abreast of its work. Unavoidable delay in the disposition of cases, when there is a greatly excessive caseload, is compounded, however, by unnecessary remands for further hearings. Here the Union has asked for additional hearings, and could hardly complain of the resulting delay, but the employer has not asked for them and is entitled to question their reasonableness. In this it derives some comfort from the fact that two members of the Board dissented from each of the remand orders.

[12] The Board has a broad discretion in controlling its administrative procedures. In remanding undecided cases for further hearings, it is not necessarily restricted by the rules governing motions in courts for new trials based upon after discovered evidence. No one suggests, for instance, that it was not within the Board's power and discretion to remand the case for the first time for the purpose of obtaining evidence on the supplemental question, and we think a court should not interfere with the Board's processes to the extent that, in any view, additional hearings and additional evidence might have been reasonably regarded by the Board as of assistance to its administrative procedures and not unduly oppressive.

The Board's discretion is not unfettered, however. The employer's rights under § 6 of the Administrative Procedure Act cannot be ignored. Under that Act, the employer should be free from required participation in supplemental hearings which are repetitive, purposeless, and oppressive, when the conduct of the hearings constitutes a failure to conclude the proceedings with reasonable dispatch.

What is required is some balance between the interest of the Board, of the Union, and of the employer. It should be recognized, on the one hand, that the court should not interfere with any reasonable exercise of the Board's discretion in controlling the progress of the proceedings pending before it. On the other hand, adequate protection of the employer's rights should be afforded.

With these considerations in mind, we think the injunctive order of the District Court went too far when it prohibited the holding of hearings on the question of whether, and when, the old New York corporation, Deering Milliken & Co., Inc., was merged into the Delaware corporation, The Cotwool Manufacturing Corporation. We may agree with the District Judge that the relevance of such inquiry is dubious, but, while the Board's pleading in the District Court was a technical admission, for the purpose of this action, of the truth of the facts respecting the merger as set forth in the complaint, there may be good reason why the actual facts respecting that transaction should be made a matter of record before the Board. Such reason may arise because there is nothing to indicate the Union has accepted as true the facts set forth in the employer's affidavit and because the Union originally drew a different inference from the press release of December 1960. The facts respecting the issuance of that press release and the claimed merger are the kind of facts which quickly and easily may be incorporated in the record. Neither the hearings to develop them nor the preparation of an intermediate report containing the Trial Examiner's findings with respect to them, and their bearing, if any, upon earlier findings and conclusions of the First Supplemental Intermediate Report, need occasion a great time lapse. The conduct of hearings as to these matters, if such hearings may be promptly undertaken, would impose no undue additional burden upon the employer, and it may serve a proper purpose of permitting the Board to complete a record upon which it may act. At least, we think the District Court should have deferred to the Board's exercise of its discretion to inquire into these particular matters, provided a hearing may be opened and concluded promptly.

On the other hand, the remainder of the Board's remand order is so unspecific and broad that it lends justification to the fears of the plaintiff in this action that hearings lasting weeks and months, and costing many thousands of dollars, may be required to replow the same ground covered in the hearings on the first remand. This, we think would impose undue additional delay, in the light of the overly long pendency of these proceedings already, amounting to a failure to bring these proceedings to a conclusion with reasonable dispatch. To the extent, therefore, that the order of the District Court prohibits further hearings on the second remand directed to the issue occasioning the first remand, or any other unspecific matter, we think the District Court's action was justified by the record.

As we think that the Board should be allowed to make the facts respecting the merger of Deering Milliken & Co., Inc. into Cotwool, matters of record before the Board, we are not unconscious of the possibility that there may be some other specific line of inquiry which may be accomplished easily and without delay with some expectation that it may facilitate ultimate Board disposition of the administrative proceeding without imposing additional burdens upon the parties. While no such specific inquiry apart from the merger of Deering Milliken & Co., Inc. into Cotwool, is suggested by the remand order, we think it appropriate that the District Court should retain jurisdiction of the cause to the end that it may entertain promptly any subsequent application for additional orders or for specific modification of its decree, not inconsistent with the views expressed in this opinion.

To those ends the [illegible] remand to the [illegible] with instructions to [illegible] order to permit the facts respecting [illegible] release of December 1950 and the merger of Deering Milliken & Co., Inc. into Cotwool to be made [illegible] record before the Board, to provide [illegible]

accomplished, and for further proceedings and orders as may be appropriate and not inconsistent with this opinion.

Remanded.

DARLINGTON MANUFACTURING COMPANY and Deering Milliken, Inc., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Textile Workers Union of America, AFL-CIO, Intervenor.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Darlington Manufacturing Company and Deering Milliken, Inc., Intervenors.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

DEERING MILLIKEN AND COMPANY, Inc., Respondent.

Nos. 8790, 8361, 8906.

United States Court of Appeals Fourth Circuit.

Argued June 13, 1963.

Decided Nov. 15, 1963.

Proceeding on petitions by employer and others to review and set aside order of National Labor Relations Board, to review and modify a decision and order of the Board, and for enforcement of the order. The Court of Appeals, Albert V. Bryan, Circuit Judge, held that even if employer's decision to close plant was based in part upon unionization of the plant, such closing did not constitute an unfair labor practice when the employer went out of business in toto and sale of corporation's plant was entire, bona fide and irrevocable.

Enforcement of orders denied.

Bell, J., and Sobeloff, Chief Judge, dissented.

1. Labor Relations ⇐392

Even if employer's decision to close plant was based in part upon unionization of plant, such closing did not constitute an unfair labor practice when employer went out of business in toto and sale of corporation's plant was entire, bona fide and irrevocable. National Labor Relations Act, § 8(a) (3) as amended 29 U.S.C.A. § 158(a) (3).

2. Labor Relations ⇐2, 4

Fundamental purpose of National Labor Relations Act is to preserve and protect rights of both industry and labor so long as they are in relationship of employer and employee, and Act does not compel a person to become or remain an employee and it does not compel one to become or remain an employer, and either may withdraw from that status with immunity so long as obligations of any employment contract have been met. National Labor Relations Act, § 1 et seq., as amended 29 U.S.C.A. § 151 et seq.

3. Labor Relations ⇐392

A part of business may be discontinued, even if spurred by unionization, if the cessation is entire, bona fide and irrevocable without any violation of National Labor Relations Act, and there is no liability for such cessation which may be transferred to parent corporation upon single employer principle. National Labor Relations Act, § 8(a) (3) as amended 29 U.S.C.A. § 158(a) (3).

Thornton H. Brooks, Greensboro, N. C. (McLendon, Brim, Holderness & Brooks,

Greensboro, N. C., on the brief) for Darlington Manufacturing Co.

Stuart N. Updike and John R. Schoemer, Jr., New York City (Townley, Updike, Carter & Rodgers, New York City, on the brief) for Deering Milliken, Inc., and Deering, Milliken and Company, Inc.

Nancy M. Sherman, Atty., N.L.R.B., Arnold Ordman, Gen. Counsel; (Dominick L. Manoli, Associate Gen. Counsel; Marcel Mallet-Prevost, Asst. Gen. Counsel, and James C. Paras, Atty., N.L.R.B., on the brief) for National Labor Relations Board.

Benjamin Wyle, New York City (Patricia Eames, New York City, on the brief) for Textile Workers Union of America, AFL-CIO.

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and BELL, Circuit Judges, sitting en banc.

ALBERT V. BRYAN, Circuit Judge.

The National Labor Relations Board in these consolidated cases has made these pivotal decisions [1]:

1. Darlington Manufacturing Company committed an unfair labor practice under the National Labor Relations Act, Section 8(a) (3) [2]—forbidding discrimination in regard to tenure of employment—by closing and liquidating its only plant, and discharging its employees, in 1956 because of the election of Textile Workers Union of America, AFL-CIO as bargaining representative for the employees;

2. Darlington must pay all of such discharged employees their wages, less current net earnings, "until the discharged employees are able to obtain substantially equivalent employment" or until they are put on a preferential hiring list by Deering Milliken, Inc.; and

3. Deering Milliken, Inc. and its affiliates are liable for the payment of these wages on the ground that Darlington, with others, was such an affiliate of Milliken and together they constituted a single employer.

In petition No. 8790 Darlington and Milliken seek to vacate these Board orders. In No. 8861 the Union, which was the charging party before the Board, prays that the orders be enlarged to require also the reopening of the Darlington plant with reinstatement of the employees, and that Roger Milliken, president of both Darlington and Milliken, notwithstanding the contrary decision of the Board, be held personally liable to satisfy the orders. In No. 8906 the Board seeks enforcement against Milliken of the Darlington liabilities.

As these actions have common issues they have been argued and considered together. We decline to enforce these orders of the Board against Darlington and Milliken.

[1] Darlington, chartered under the laws of South Carolina, operated a print cloth mill there, manufacturing and selling cotton greige goods. It had no other plant. In 1937 Darlington went through a Section 77B bankruptcy proceeding, 11 U.S.C. § 207 (1937 ed.). Milliken, then known as Deering Milliken & Co., Inc., as one of the largest creditors, received in payment of its debt about 41% of Darlington's common stock. When Darlington was liquidated in 1956, as previously mentioned, there were outstanding 150,000 shares of common stock owned as follows:

Deering Milliken & Co., Inc.	41.4%
Cotwool Manufacturing Corp.	18.3
Roger Milliken and members of his immediate family	6.4
Directors and employees of Deering Milliken & Co.	2.9
Outsiders or non-Milliken family or interests (about 100 stockholders living in South Carolina, 50 in New York, and more than 50 scattered over the United States)	31.0
	100.0%

1. 139 NLRB No. 23, decided October 18, 1962.

2. 29 U.S.C. § 158(a) (3).

In March 1956 the Union commenced a campaign to organize the Darlington employees and to become their bargaining representative. An election conducted under the direction of the Board was called for September 6, 1956. The Union won, 258 to 252.

On September 12 Darlington filed objection to the election. A conference was requested on the same day by the Union to discuss a collective bargaining agreement. The request was refused by Darlington on the ground the election protest had not been decided and the Union had not been certified.

Also on September 12, the Board of Directors met, with all of them present. Following a brief discussion of the business status of Darlington, they resolved to recommend to the stockholders the liquidation and dissolution of the corporation. A meeting of the stockholders to act upon the resolution was called for October 17. Employees of Darlington were at once told of the recommendation. While no new ones were accepted, the plant continued to fill the orders then in hand. The objection of Darlington to the election was overruled on October 8, and the Union shortly certified as the bargaining representative.

With the stockholders on October 17 adopting the recommendation of the Board of Directors by a vote of 134,911 shares to 3,774 the officers proceeded with the liquidation. Discharge of employees occurred over a span of about six weeks: from 510 employees on October 13, the payroll dropped to 460 on October 20, to 345 on October 27 and to none when the plant closed on November 24. The machinery and equipment were sold at auction on December 12 and 13, 1956. Since that time Darlington has not operated any plant in South Carolina or elsewhere [3].

Deering Milliken & Co., Inc.'s capital stock was owned in a majority amount by the members of the Milliken family. In addition they were the major (but by no means the only) shareholders in Darlington and in certain other textile corporations. The latter are the corporations referred to by the Board and in this opinion—somewhat imprecisely—as "affiliated corporations" of Milliken. Prior to 1960 Deering Milliken & Co., Inc. was not a manufactory. It was the exclusive sales representative of the producing corporations controlled by the Milliken family.

In June 1960 Deering Milliken & Co., Inc. was merged into the Cotwool Manufacturing Corporation, and the latter's name then changed to Deering Milliken, Inc., herein known as Milliken. A majority of its stock was owned by the Milliken family. After the merger Milliken carried on the textile manufacturing formerly pursued by Cotwool.

The finding of the Board—that the decision to close the mill was an unfair labor practice under § 8(a) (3)—was spelled out in this way:

> "Darlington discriminated in regard to its employees' tenure of employment by closing its plant—thereby discharged the employees—and, because the plant closing was the direct result of the employees' selection of the Charging Union as their collective bargaining representative, Darlington's retaliation against the employees for their activities in behalf of the Union discouraged the employees' continued membership in the Union."

Abridged and as pertinent here the terms of § 8(a) (3) are these:

> "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In this determination the Board acknowledged, as the Trial Examiner had

3. A concise history of the proceedings in this case appears in Judge Haynsworth's opinion for this Court in Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (1961).

found, that there were economic considerations sufficient in themselves to support the decision by Darlington to terminate operations. However, both the Examiner and the Board concluded that "the decision to close the mill was not a fact based on economic factors, and that, but for the Union's election victory, that decision would not then have been made."

Upon this premise the Board declared all the closure discharges to be unlawful, justifying the usual remedy of reinstatement and reimbursement for loss of pay. But with the shutdown complete and permanent reinstatement not achievable, the relief was necessarily directed primarily to restitution of wages. The monetary redress was awarded by the Board as follows:

> "[W]e shall therefore order the Respondent, Darlington, to provide back pay *until the discharged employees are able to obtain substantially equivalent employment*". [Accent added.]

Further, the Board overruling the Trial Examiner found that "Darlington occupied a single employer status with Deering Milliken and its affiliated corporations". On this basis Milliken and its affiliates were declared "liable for back pay to the same extent as we have heretofore directed with respect to Darlington" and were ordered to place the discharged employees on a preferred hiring list. Additionally, Milliken was commanded to offer employment to these discharged workers in its other mills in South Carolina or nearby States, without prejudice to their seniority and other privileges.

All of these orders were qualified by the proviso that if no work was available at the Milliken mills, then the accumulation of back pay would be tolled as and when the dischargees were put upon Milliken's preferential hiring list.

I. Our opinion is that the decision to close the plant was not an unfair labor practice. In this we accept the findings of fact made by the Board. While, as just observed, the evidence discloses substantial economic reasons warranting the determination to close the plant without reference to the entry of the Union into the plant, we accede arguendo to the contention of the Board that these reasons were not acted upon. Even if they were, however, we shall assume, again arguendo, with the Board that if unionization also played a part in the resolve to close the plant, then the contribution of this factor may be considered as responsible for the cessation.

[2] To go out of business in toto or to discontinue it in part permanently at any time, we think was Darlington's absolute prerogative. The fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee. But the statute's scope does not exceed that province. It does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met. Such withdrawal, alone and of itself, does not create any obligation of either the employer or the employee to the other under the Act. *Cf.* Dissenting opinion of Board Member Rodgers in the present case. If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part. A statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity. Consider the consequences of an attempt to punish as contempt a violation of such an order, and its fatal infirmity is revealed: the proprietor would be jailed or otherwise penalized for not reopening a demised business reinstating employees.

Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations—not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No ruse or subterfuge is suggested here. Darlington's was an

absolute desistence, not a temporary intermission as apparently was contemplated in N. L. R. B. v. Norma Mining Corp., 206 F.2d 38 (4 Cir. 1953). There was no provisional lockout, the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable. The Trial Examiner demonstrated beyond debate that Darlington was not a "runaway" plant—that is, a plant having another existence in another form—finding that Darlington was not hidden among the other Milliken corporations. No disagreement with this finding was, or on substantial evidence could have been, expressed by the Board.

"There is no decided case", the Board candidly states, "directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive". While a number of the decisions on the point mention the presence of a legitimate economic reason in connection with the right to close, an analysis of them discloses that they do not declare the existence of such a reason to be indispensable to the validity of the closing. See, e. g., N. L. R. B. v. Preston Feed Corp., 309 F.2d 346, 352 (4 Cir. 1962); N. L. R. B. v. New England Web, Inc., 309 F.2d 696, 700 (1 Cir. 1962); N. L. R. B. v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2 Cir. 1961); Union Drawn Steel Co. v. N. L. R. B., 109 F.2d 587, 592 (3 Cir. 1940). Nor are they precedents for the proposition that an owner or operator cannot go out of business at his option if the closure is intended to be, and is in truth, absolute and permanent. These authorities, we think, support the view that if the termination is without intent to resume the business elsewhere—as a runaway—the power to close, even if spurred by unionization, is not precluded by the Act.

The right is implicitly recognized in Southport Petroleum Co. v. N. L. R. B., 315 U.S. 100, 106, 62 S.Ct. 452, 456, 86 L.Ed. 718 (1942), with Justice Jackson saying, "Whether there was a *bona fide* discontinuance and a true change of ownership—*which would terminate the duty of reinstatement*" was a question of fact determinable by the Board or the Court on contempt proceedings. [Accent added.] Bona fides does not mean exclusively an economic ground, but as well that the termination was, as here, not merely a gesture but an actuality.

Lower courts have long given explicit sanction to the right of discontinuance. Over 20 years ago the Fifth Circuit said in N. L. R. B. v. Tupelo Garment Co., 122 F.2d 603, 606 (5 Cir. 1941):

> "The stockholders of Tupelo Garment Co. [the employer] had the absolute right to dissolve their corporation and the Board was without authority to prevent this."

Recently, the Sixth Circuit put it this way in N. L. R. B. v. R. C. Mahon Co., 269 F.2d 44, 47 (6 Cir. 1959):

> "We find nothing in the National Labor Relations Act which forbids a company, in line with its plans for operation, to eliminate some division of its work. As held in National Labor Relations Board v. Adkins Transfer Company, Inc., supra, [6 Cir., 226 F.2d 324] an employer faced with the practical choice, either of paying enhanced wage rates demanded by a union or of discontinuing a department of its business, is entitled to discontinue."

Other courts have spoken in like manner and as emphatically, e. g., N. L. R. B. v. New England Web, Inc., supra, 309 F.2d 696, 700; Jays Foods, Inc. v. N. L. R. B., 292 F.2d 317, 320 (7 Cir. 1961); N. L. R. B. v. New Madrid Mfg. Co., 215 F.2d 908, 914 (8 Cir. 1954); N. L. R. B. v. Caroline Mills, Inc., 167 F.2d 212, 214 (5 Cir. 1948); Atlas Underwear Co. v. N. L. R. B., 116 F.2d 1020, 1023 (6 Cir. 1941).

To be sure, there are decisions adjudging the employer liable even upon an absolute disposition of all or a part of the business equipment: N. L. R. B. v. Kelly & Picerne, Inc., 298 F.2d 895 (1 Cir. 1962); N. L. R. B. v. Missouri Transit Co., 250 F.2d 261 (8 Cir. 1957); N. L. R. B. v. Bank of America, 130 F.2d 624 (9 Cir.), cert. denied, 318 U.S. 791, 63

S.Ct. 992, 87 L.Ed. 1157 (1942). Upon examination, however, it will be observed that these cases did not involve the extinguishment altogether of the business and the end of further participation by the employer in his former sphere. The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business.

[3] II. The doctrine of single employer, heretofore noted, was used by the Board to project Darlington's liability as determined by the Board, upon Milliken. See N. L. R. B. v. Gibraltar Industries, Inc., 307 F.2d 428, 431 (4 Cir. 1962), cert. denied, 872 U.S. 911, 83 S.Ct. 724, 9 L.Ed.2d 719 (1963); N. L. R. B. v. Deena Artware, Inc., 361 U.S. 398, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960). Our decision that Darlington is without liability, of course, bars such expansion of responsibility. Furthermore, even if Darlington was a division of Milliken, the transfer of Darlington's liability to Milliken upon the single employer principle is precluded because, as we have stated, a part, like the whole, of a business may be abolished when the extinction is consummated in circumstances like the present.

III. In its petition the Union asked us to enlarge the Board's order to include Roger Milliken individually in the orders of restoration of wages entered by the Board. This prayer like the further prayer of the Union that Darlington be required to reopen its plant is, obviously denied by our acquittal of Darlington of liability.

The Board sustained the Trial Examiner in finding that Darlington had violated § 8(a) (1) in pre- and post-election statements and urging a repudiation of the Union. Likewise § 8(a) (5)—wherein refusal to bargain is made an unfair practice—was found contravened by Darlington. Remedies for these offenses are not now available as Darlington is no longer alive.

Power to command an employer to stay in business indefinitely, or assess him with damages for permanently going out of business, is not a National Labor Relations Board prerogative. Assumed by the Board in these cases, it is denied here.

Enforcement of Orders Denied.

J. SPENCER BELL, Circuit Judge, with whom SOBELOFF, Chief Judge, concurs, dissenting:

If I read the majority opinion correctly it stands for the proposition that an employer may cease business in whole or in part for any reason, including anti-union bias, so long as such cessation is actual, unfeigned and permanent. It also holds that having ceased business and thereby terminated the employer-employee relationship, an employer may not be held liable under the National Labor Relations Act for any violations committed prior to his cessation of business. Since, in the opinion of the majority, an employer may cease business in part for any reason, including anti-union bias, they do not reach the question presented by the Board's finding that Deering Milliken [1] constituted a single employer of which Darlington was a part.

In my opinion the question presented to this court is whether an employer commits an unfair labor practice when he closes down a part of his business in order to discourage the practice and procedure of collective bargaining and to retaliate against his employees for exercising their freedom of self organization under the National Labor Relations Act. Not only does such conduct violate the basic policies embodied in the Act; it is literally within the proscription of Section 8(a) (3). Furthermore, it has been

1. Throughout this opinion Deering Milliken is used to refer to the entire complex of 27 manufacturing corporations and the affiliated service corporations unless it is clear from the context that the reference is to the factoring and sales agency, Deering Milliken and Company, Inc., later merged into Cotwool Manufacturing Corp. and then called Deering Milliken, Inc.

held to be an unfair labor practice by prior decisions of this and other Circuits, and I am unable to read the cases cited by the majority in support of its opinion as holding to the contrary.

Single Employer Status

The Board found that there was a sufficient degree of common ownership and control of labor relations and operations among Darlington, Deering Milliken, and its affiliated corporations to bold that these entities were in reality a single employer under the National Labor Relations Act.

As this court held in N. L. R. B. v. Gibraltar Industries, Inc., 307 F.2d 428, 431 (4 Cir. 1962), cert. denied, 372 U.S. 911, 83 S.Ct. 724, 9 L.Ed.2d 719 (1963), a Board determination that two or more economic entities constitute a single employer is entitled to judicial approval if "there is substantial evidence in the record to support the Board's conclusion and order". The court in review, moreover, may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*". Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951). I am convinced, upon review of the record as a whole, that there was an abundance of evidence to support the Board's position that Darlington, Deering Milliken and its affiliates constituted a single employer for purposes of the Act.

The record reveals that Darlington at the time when it ceased operations was one of seventeen corporations in the Deering Milliken complex owning and operating twenty-seven manufacturing plants scattered throughout the Eastern Seaboard. Deering Milliken performed the dual function of selling goods produced by each of these manufacturing corporations and factoring their accounts receivable.[2]

The head of Deering Milliken's Tax Department, C. W. Kable, Jr., was an officer of each of the seventeen manufacturing corporations. His Department prepared all federal and state tax returns of the manufacturing corporations and advised them on a wide variety of tax benefits to be derived through following the Department's suggestions in such matters as accounting procedures, vacation plans, and incentive compensation contracts for supervisors. The Tax Department also advised the various manufacturing corporations in the proper drafting of minutes of directors' and stockholders' meetings.

The Deering Milliken Insurance Department handled all insurance for the various plants. The manufacturing corporations purchased standard forms of insurance through the Insurance Department, with policies running to each of them. Fire insurance and workmen's compensation insurance, however, were purchased under a policy covering all the plants. Significantly, Deering Milliken paid premiums on an executive air insurance policy covering both Deering Milliken executives and key manufacturing personnel, along with executives of Deering Milliken Service Corporation and Deering Milliken Research Corporation.

The Deering Milliken Service Corporation, a wholly owned subsidiary of the seventeen manufacturing corporations, was organized in 1951 for the stated purpose of providing "essential services to organizations in the textile industry at the lowest possible cost". These services were restricted, almost exclusively, to those corporations in the Deering Milliken chain. Various departments of Deering Milliken Service purchased all machinery, equipment, and cotton for the manufacturing plants. Research was conducted in the area of product improvement and studies were regularly

2. Each mill corporation was charged a fee for services rendered. The service charges made were substantially less than those which would have been made by independent selling and factoring agents. Also of importance is the fact that Deering Milliken had no other non-Milliken affiliated mills as clients.

made in connection with production problems common to several or all of the plants. Based on its findings, Deering Milliken Service made recommendations to the various manufacturing corporations with a view toward obtaining maximum efficiency from raw materials, equipment, and personnel. These recommendations directly affected the work loads and work speeds in the manufacturing plants, a critical area of labor relations.

The Placement Department of Deering Milliken Service conducted an annual recruitment program among college students, seeking to attract supervisory personnel for each of the manufacturing corporations. The prospective management and technical trainees were encouraged to look upon the organization as a whole. The record reveals that after hiring there was considerable movement of supervisory personnel between corporations. For instance, approximately half of the supervisors who worked at Darlington between 1951 and 1956 were hired from other Deering Milliken corporations, as was Darlington's Mill Treasurer, James M. Oeland.

Supplementing the services carried on by Deering Milliken Service, Deering Milliken Research Corporation conducted surveys and inspections in the manufacturing plants toward the goal of standardizing a preventative maintenance system common to all of the mills.

The record, in sum, reveals that the Deering Milliken complex was a thoroughly integrated, monolithic enterprise. The participating mills were able to call upon various service arms of the enterprise to effect optimum employment of men, material, and machinery. Sales were made and factored through a common agency. Management personnel was jointly recruited and transfers freely made from one corporation to another. Moreover, descriptive literature and advertising published by Deering Milliken on behalf of the manufacturing corporations repeatedly emphasized the generic brand name of Milliken rather than individual corporate brand names.

After the alleged unfair labor practices which formed the subject matter of the present controversy, Deering Milliken & Co., Inc., in 1960 merged into the Cotwool Manufacturing Corp. to form Deering Milliken, Inc., and several of Cotwool's former subsidiaries were then liquidated into Deering Milliken, Inc. I find the merger of more than passing interest. To me it indicates that the separate corporate entities of the Deering Milliken complex were largely paper corporations which could be shifted and changed at the convenience of the Milliken family. This is highlighted by the fact that the various liquidations and mergers had no substantial effect on the actual functioning of the various entities within the Deering Milliken enterprise. Minot Milliken, Vice President of Deering Milliken, Inc., himself testified that nothing "of substance" was changed as a result of the merger. I think the ease with which this corporate change was made in 1960 strongly indicates that the Deering Milliken complex in 1956 at the time of Darlington's dissolution was a single employer in which "corporate forms [were] largely paper arrangements that [did] not reflect the business realities." N. L. R. B. v. Deena Artware, Inc., 361 U.S. 398, 403, 80 S.Ct. 441, 444, 4 L.Ed.2d 400 (1960). The critical question becomes, therefore, did the Board have substantial evidence upon which to base its conclusion that there was a degree of common control and ownership existing in this unified industrial complex to warrant finding a single employer?

As pointed out in the majority opinion, Deering Milliken's capital stock was owned in majority amount by the members of the Milliken family. In addition they owned controlling stock in Darlington and in all of the other manufacturing corporations. These mill corporations, in turn, owned all the shares of Deering Milliken Service Corporation, and, along with Deering Milliken & Co., Inc., all the shares in Deering Milliken Research Corporation. The stock ownership was used by the Milliken family to place members of the Milliken family in the position of

corporate officers and board directors of the various corporations. Roger Milliken was President of Deering Milliken and President also of all the manufacturing corporations except Laurens (where he was Vice President and on the Board of Directors). A majority of the directors of all the manufacturing corporations except one (Hartsville) were members of the Milliken family. Deering Milliken doesn't seriously deny that the Milliken family's stock ownership permitted the family, and more specifically Roger Milliken, to exercise dominion and control over all phases of business and labor relations at each mill and over each and every corporate entity in the entire complex, but rather, it strongly denies that such control was actually exercised.

The Board found that through majority stock ownership and interlocking directories, the Milliken family (especially in the person of Roger Milliken) was able to and did exercise actual control in the area of labor relations. As stated by the Board:

> "Roger Milliken, the president of all of the corporations save one, exercised ultimate control over the labor relations of all of the corporations. Thus he received reports from each of the mills as to progress in reducing the number of jobs, the pay raises given, hours worked and job assignments, was asked for approval of various personnel actions, and made suggestions as to the hiring of personnel. More important, however, was Roger Milliken's participation in the area having the greatest impact on labor relations—the area of collective bargaining. Thus he circulated a memorandum and editorial which was obviously intended as a primer for the managers of the mills in combatting union organization. During the organizational compaign his pervasive influence was demonstrated by the statements of supervisory employees that Roger Milliken would close the plant rather than permit its unionization."

The Board does not suggest that Roger Milliken actually engaged in the day to day direction of labor relations at each of the plants. The day to day details inevitably had to be left to the resident chief executive officers, the Mill Treasurers. Everything other than over-all direction and guidance as to company policy of labor relations would, of necessity, have to be exercised by subordinates. Indeed it seems remarkable that Roger Milliken had the time, in view of his far flung interests and responsibilities, to keep informed about labor relations in the individual mills and to make the detailed suggestions as to many facets of labor relations that the record reveals he did. The record is replete with suggestions and recommendations by Roger Milliken to the Mill Treasurers on ways to improve production and reduce jobs. For instance, Roger Milliken on different occasions proposed that each piece of machinery be tagged with its cost to discourage misuse, that closed circuit television be utilized to eliminate certain jobs, that machinery be rearranged to reduce the operator's walking distance, that the time which employees spent smoking be limited, and that beverage dispensing machines for employee use be installed. These suggestions were usually made in reference to "our" mills. These and other suggestions were not always followed, but they unmistakably indicate that Roger Milliken kept himself constantly informed as to what was occurring and didn't hesitate to suggest improvements.

Proof of Roger Milliken's ultimate and uncontradicted control over major policies affecting labor relations was illustrated by his decision, with approval of his family, to close the Darlington plant because of the employees' decision to be represented by a union.

After the union had won the Board supervised election of September 6, 1956, Darlington Mill Treasurer Oeland and Darlington attorney Poag telephoned Roger Milliken to advise him of the union's victory. One day later, Roger Milliken decided to close down the mill.

Roger Milliken informed three members of his family, who were on the Darlington Board of Directors, of his intention to close the mill, he did not inform Mill Treasurer Oeland. On September 12, the Board met and unanimously passed a resolution to close the mill. This resolution was acted upon at a shareholders' meeting of October 17 and passed by a large majority, with only a few shareholders who were residents of the Town of Darlington voting against liquidation. Immediately after the shareholders' meeting, Roger Milliken was informed by South Carolina State Senator Mozingo, a resident of the Town of Darlington, that 83% of the mill employees disavowed the union and had signed a petition to go back to work. Roger Milliken's reply was: "As long as there are 17% of the hard core crowd here I refuse to run the mill."

Thus I find in the record overwhelming evidence to support the Board's holding:

> "[W]e conclude that Deering Milliken, primarily through the person of Roger Milliken, exercised control over the labor relations of all the corporations, including Darlington. Although the details of day-to-day personnel relations may have been, of necessity, conducted at the mills, it is manifest that the major decisions were exclusively in the hands of Roger Milliken. Under such circumstances it is clear that Deering-Milliken must assume responsibility for control of Darlington's labor relations."

Deering Milliken's brief contends that the Board had no basis to find that Roger Milliken was not acting solely in his capacity as President of Darlington Mills. The evidence, however, points to the fact that Roger Milliken retained ultimate control over the whole Milliken complex and acted as its chief executive officer, without delineating his various capacities. The Darlington Mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization. Such conduct was properly considered by the Board to fasten responsibility of his actions for unfair labor practices upon the entire complex.

Closing Mill Unfair Labor Practice

Having found that the Board had ample evidence to conclude that the Milliken complex was a single employer under the Act, the next question to consider is whether under the decided cases, the act of Deering Milliken in shutting down the Darlington plant was an unfair labor practice, cognizable under Section 8(a)(3).

That the plant closure was the direct result of the organizational activities of the employees is too well documented by the record to require extended discussion. Roger Milliken himself gave that reason to his stockholders for his decision to close the mill. On approximately thirty separate occasions, supervisory personnel threatened the employees with closure in case the union won, and attributed their prophesies to Roger Milliken's well publicized hostili[illegible] to unions. Milliken himself circulated to all of his mills a trade magazine article pointing out that his attitude was so well known that liquidation was inevitable from the minute the election result was announced. Darlington's belated efforts to stress the economic factors are belied by the prior history of the mill. In the nine months prior to the election, management had spent $400,000.00 in a modernization program which included not only new machinery but additions to plant structure. A belief that union wage demands and bargaining attitudes towards work loads may make future operations unprofitable does not constitute an economic reason which would excuse the petitioner's conduct in this case. The Board found upon abundant evidence that the respondent's conduct was discriminatorily motivated.

"Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach upon protected rights. The employer's claim of legitimacy is thereby totally dispelled [Citing cases].

"* * * 'The ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.' Labor Board v. Truck Drivers Union, 353 U.S. 87, 96 [77 S.Ct. 643, 647, 1 L.Ed.2d 676]." National Labor Relations Board v. Erie Resistor Corporation, et al., 373 U.S. 221, 228, 83 S.Ct. 1139, 1145, 10 L.Ed.2d 308.

This court has held, in unison with other Circuits, that an employer may neither temporarily shut down operations to avoid bargaining with a union, N. L. R. B. v. Norma Mining Corp., 206 F.2d 38 (4 Cir. 1953), nor may he subcontract out work to another employer formerly done by a division in his business for that purpose, N. L. R. B. v. Preston Feed Corp., 309 F.2d 346 (4 Cir. 1962). Moreover, other Courts of Appeals have held that an employer may not transfer work to another plant owned, directly or indirectly by the employer himself, to avoid bargaining. See, *e. g.*, N. L. R. B. v. United States Air Conditioning Corp., 302 F.2d 280 (1 Cir. 1962); N. L. R. B. v. Winchester Electronics, Inc., 295 F.2d 288 (2 Cir. 1961); N. L. R. B. v. Lexington Electric Products Co., 283 F.2d 54 (3 Cir. 1960); cert. denied, 365 U.S. 845, 81 S.Ct. 805, 5 L. Ed.2d 810 (1961); Butler Bros. v. N. L. R. B., 134 F.2d 981 (7 Cir. 1943). I fail to see any distinction in principle between such conduct and that of the Petioner here.

More to the point, I consider the decision of this court in N. L. R. B. v. Preston Feed Corporation, 309 F.2d 346 (4 Cir. 1962) as controlling on the legal issue here. In that case the Board sought enforcement of its order requiring the employer to reinstate its trucking operations which the Board found had been closed down in order to discourage unionization among its employees. This court enforced the order, pointing out that although the employer had decided for valid economic reasons to close the operation in the future, its sudden and precipitate closure was to discourage unionization and, therefore, constituted an unfair labor practice which could be remedied by requiring reopening until the employer could vindicate its closing for economic reasons. Judge Soper, speaking for a unanimous court, recognized the employer's right to close for valid economic reasons:

"The question has been considered in a number of cases in which the Board, in order to effectuate the purposes of the Act, has thought it desirable to require an employer to continue a certain business operation or department which he desired to abandon. In these cases it has been uniformly held that the Board is without power to interfere with management *where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in the exercise of rights conferred upon them by the statute.* (Citing cases) (Emphasis added.).

"In the instant case, as we have seen, the initial decision of the company to close its trucking department was based on economic reasons and not on hostility to the union, but the immediate decision and the prompt closing of the department on March 6th, when it was discovered that the employees led by the union were insisting upon their rights under the statute, was impelled by the intent to restrain the employees in their rights to collec-

tive bargaining. We shall, accordingly, enter a decree that the order of the Board in these and other particulars be enforced * * *." 309 F.2d at 352.

It is apparent that the Board's order in this case is within the rationale of this court's judgment in the Preston case. See also N. L. R. B. v. Norma Mining Corp., 206 F.2d 38 (4 Cir. 1953), where this court through Judge Dobie, speaking for a unanimous court, enforced the order of the Board requiring an operating lessee to reopen a mine closed by the employer in violation of Section 8(a) (1) and (3) of the Act.

Again, the Eighth Circuit in N. L. R. B. v. Missouri Transit Co., 250 F.2d 261 (8 Cir. 1957) faced a situation closely analogous to the one we have here. The Board's finding of an unfair labor practice and the relief granted by the Board and enforced by the court support the Board in this case. The Missouri Transit Company was a common carrier of passengers by bus for hire engaged in two operations: one a short-line intrastate shuttle bus operation between Waynesville, Missouri, and Fort Leonard Wood, Missouri; the other a long-line interstate bus operation between Fort Leonard Wood and Cedar Rapids, Iowa. As a result of union attempts to organize the shuttle-line bus drivers, the company sold all the equipment used in the operation of the shuttle route to a competitor. This action resulted in the discontinuance by the company of the shuttle-line route and service, and terminated the employment of all shuttle-line bus drivers. Upon the filing of an unfair labor practice against the company, the Board found that the company had disposed of the shuttle-line route and equipment used in operating it, and had discharged the shuttle-line drivers, for discriminatory reasons, in violation of Section 8(a) (3) and (1) of the Act. In granting affirmative relief, the Board ordered that the company place the discharged drivers on a preferential hiring list for priority consideration for jobs in the long-line operations and that the company pay back wages to these individuals from the date that the shuttle-line bus operations were closed to the date when they were either reinstated or placed on a preferential hiring list.

The company contended that the Board was powerless either to order back pay beyond the time when the shuttle-line bus operation ceased or to order reinstatement in a completely separate and independent division of the company. The Eighth Circuit rejected the Company's contentions and ordered enforcement of the Board's order in full. I think the logic of the Missouri Transit case compelling and the application of the principles announced clearly appropriate to the case here being considered.

In N. L. R. B. v. Wallick, 198 F.2d 477 (3 Cir. 1952), that court sustained a Board order requiring a respondent partnership which operated several enterprises engaged in the manufacture of ladies' garments to either reopen a plant which it had closed in violation of the Act because its employees had organized or give its employees an opportunity to work in other plants operated by the partnership. This was true even though the closed plant was owned by a separate corporation the stock of which was owned by the individual partners. See also A. M. Andrews Co. of Oregon v. N. L. R. B., 236 F.2d 44 (9 Cir. 1956).

In the present case, even absent single-stockholder status, the employees had a remedy. After the Darlington stockholders on October 17, 1956, had adopted the recommendations of the Board of Directors to liquidate the Darlington Mill, employees were discharged in separate groups over the intervening period until the plant closed on November 24. Yet, pursuant to the laws of South Carolina, the corporation continued to exist for the purpose of liquidating its assets and settling its liabilities. If, as the Board found, amply supported by the record as a whole, these discharges were for discriminatory reasons under Section 8(a) (3), relating to the employees' "tenure of employment," then at a very minimum the amounts realized from the sale of

Darlington machinery and equipment should be allocated to reimbursing the discharged employees for lost wages from the time of their discharge until the liquidation of the corporation had been completed. It is obvious that if one or two, or even a majority of employees had been discharged for their activities on behalf of the union, then the court would uphold a Board finding of an 8(a) (3) violation. It seems tortuous logic to say, therefore, that because the company discharged without distinction both the employees who voted against the union (but who were discharged nonetheless because a majority of the employees elected to be represented by a union) and those who voted for the union, the company is absolved from liability under the Act.

But beyond this remedy I think the Board was justified in ordering Deering Milliken to provide back pay until the discharged employees were able to obtain substantially equivalent employment. The record reveals that a large number of Darlington supervisory personnel was absorbed into the Deering Milliken complex. Late in September 1956, the Deering Milliken Industrial Engineering Department sought and obtained from Darlington Mill Treasurer Oeland a list of Darlington supervisory personnel who might be "useful" to it. All of these men were interviewed by the Department. Plans were made to have all supervisory personnel of the Darlington Mill transferred to the Department's payroll for a three month period after their separation from Darlington. The purpose of this arrangement was to provide a period of time within which these men could be "picked up" by other Deering Milliken Mills. Some of these supervisors were actually picked up, going directly on the payroll of other mills without an interval on the payroll of the Department. Others were transferred to other parts of the Deering Milliken organization. Although some supervisors ceased their affiliation with Deering Milliken entirely, they were given time off, with pay, in which to seek new employment opportunities. One of these men was Mill Treasurer Oeland, who remained on the Darlington payroll until July, 1957, some seven months after mill machinery and equipment had been sold. In addition, a few supervisors received bonus payments after the Darlington closing in appreciation of their efforts during the union crisis. Thus, even though the Deering Milliken complex disclaims any responsibility after the Darlington closing for those whom it regards as its enemies, it managed to reward and find places for those whom it regarded as its friends. I see nothing to prevent enforcing the Board's order which would also require Deering Milliken to offer substantially equivalent employment to non-supervisory personnel who were equally adversely affected by the mill's closing.

I am not unmindful of the Board's findings that Darlington committed other violations in addition to the 8(a) (3) here discussed, specifically 8(a) (1) and 8(a) (5). The repeated threats of members of management that the mill would be shut down if the union won the representation election constituted a classic form of interference, restraint, and coercion proscribed by Section 8(a) (1). Section 8(a) (1) was also violated by management threats to blacklist union adherents, their interrogation of employees regarding their union activity, and their support of a petition disavowing the union after the announced intention of Roger Milliken to close the mill upon learning of the union victory.

The Board also found that the failure of the Company to bargain with the union with respect to the tenure of employment of the employees in the Darlington Mill and to furnish the union with wage and related bargaining data constituted an unfair labor practice under Section 8 (a) (5) and (1). I am convinced that the record as a whole amply supports the Board's findings, but do not feel that an extended discussion of these violations is warranted here.

TEXTILE WORKERS UNION OF AMERICA *v.* DARLINGTON MANUFACTURING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 37. Argued December 9–10, 1964.—
Decided March 29, 1965.*

A majority of the stock of Darlington Manufacturing Company, a textile mill, was owned by Deering Milliken, a marketing corporation, and the National Labor Relations Board found that the latter company was in turn controlled by Roger Milliken, Darlington's president, and members of his family. An organizational campaign by petitioner union at Darlington, although strongly resisted by the company, including threats to close the mill, was successful. Shortly thereafter the company was liquidated, the plant closed and the equipment sold. The National Labor Relations Board found that the closing was due to Roger Milliken's antiunion animus, a violation of § 8 (a) (3) of the National Labor Relations Act; that Darlington was part of a single integrated employer group controlled by the Milliken family through Deering Milliken, operating 17 textile companies with 27 mills; and, alternatively, since Darlington was part of the integrated enterprise, Deering Milliken violated the Act by closing part of its business for a discriminatory purpose. The Court of Appeals held that, even assuming Deering Milliken was a single employer, it had the right to terminate all or part of its business regardless of antiunion motives. *Held:*

1. It is not an unfair labor practice for an employer to close his entire business, even if the closing is due to antiunion animus. Pp. 269–274.

2. Closing part of a business is an unfair labor practice under § 8 (a) (3) of the Act if the purpose is to discourage unionism in any of the employer's remaining plants and if the employer may reasonably have foreseen such effect. Pp. 274–275.

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*Together with No. 41, *National Labor Relations Board* v. *Darlington Manufacturing Co. et al.*, also on certiorari to the same court.

3. If those exercising control over a plant that is being closed for antiunion reasons have an interest in another business, whether or not affiliated with or in the same line of commerce as the closed plant, of sufficient substantiality to promise a benefit from nonunionization of that business; act to close their plant for that purpose; and have a relationship to the other business which makes it probable that its employees will fear closing down if organizational activities are continued, an unfair labor practice has been made out. Pp. 275–276.

4. Since no findings were made by the Board as to the purpose and effect of the Darlington closing with respect to the employees of the other plants in the Deering Milliken group, the judgments are vacated and the cases remanded to permit such findings to be made. Pp. 276–277.

325 F. 2d 682, judgments vacated and remanded.

Irving Abramson argued the cause for petitioner in No. 37. With him on the brief were *Everett E. Lewis, Donald Grody* and *Leonard Greenwald.*

Dominick L. Manoli argued the cause for petitioner in No. 41. With him on the briefs were *Solicitor General Cox, Arnold Ordman, Norton J. Come* and *Nancy M. Sherman.*

Sam J. Ervin, Jr., and *Stuart N. Updike* argued the cause for respondents in both cases. With *Mr. Ervin* on the brief for Darlington Manufacturing Co. was *Thornton H. Brooks.* With *Mr. Updike* on the brief for Deering Milliken, Inc., were *John Lord O'Brian, Hugh B. Cox* and *John R. Schoemer, Jr.*

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Rowland F. Kirks* for the American Textile Manufacturers Institute, and by *Gerard D. Reilly* for the Chamber of Commerce of the United States.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We here review judgments of the Court of Appeals setting aside and refusing to enforce an order of the National Labor Relations Board which found respondent Darlington guilty of an unfair labor practice by reason of having permanently closed its plant following petitioner union's election as the bargaining representative of Darlington's employees.

Darlington Manufacturing Company was a South Carolina corporation operating one textile mill. A majority of Darlington's stock was held by Deering Milliken, a New York "selling house" marketing textiles produced by others.[1] Deering Milliken in turn was controlled by Roger Milliken, president of Darlington, and by other members of the Milliken family.[2] The National Labor Relations Board found that the Milliken family, through Deering Milliken, operated 17 textile manufacturers, including Darlington, whose products, manufactured in 27 different mills, were marketed through Deering Milliken.

In March 1956 petitioner Textile Workers Union initiated an organizational campaign at Darlington which the company resisted vigorously in various ways, including threats to close the mill if the union won a representation election.[3] On September 6, 1956, the union won an

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[1] Deering Milliken & Co. owned 41% of the Darlington stock. Cotwool Manufacturing Corp., another textile manufacturer, owned 18% of the stock. In 1960 Deering Milliken & Co. was merged into Cotwool, the survivor being named Deering Milliken, Inc.

[2] The Milliken family owned only 6% of the Darlington stock, but held a majority stock interest in both Deering Milliken & Co. and Cotwool, see n. 1, *supra*.

[3] The Board found that Darlington had interrogated employees and threatened to close the mill if the union won the election. After the decision to liquidate was made (see *infra*), Darlington employees were told that the decision to close was caused by the election, and

election by a narrow margin. When Roger Milliken was advised of the union victory, he decided to call a meeting of the Darlington board of directors to consider closing the mill. Mr. Milliken testified before the Labor Board:

> "I felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed [favoring unionization], that if before we had had some hope, possible hope of achieving competitive [costs] . . . by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union . . . ." (R. 457.)

The board of directors met on September 12 and voted to liquidate the corporation, action which was approved by the stockholders on October 17. The plant ceased operations entirely in November, and all plant machinery and equipment were sold piecemeal at auction in December.

The union filed charges with the Labor Board claiming that Darlington had violated §§ 8 (a)(1) and (3) of the National Labor Relations Act by closing its plant,[4]

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they were encouraged to sign a petition disavowing the union. These practices were held to violate § 8 (a)(1) of the National Labor Relations Act, n. 4, *infra*, and that part of the Board decision is not challenged here.

[4] National Labor Relations Act, §§ 8 (a)(1) and (3), as amended, 61 Stat. 140 (1947), 29 U. S. C. §§ 158 (a)(1) and (3) (1958 ed.), provide in pertinent part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

and § 8 (a)(5) by refusing to bargain with the union after the election.[5] The Board, by a divided vote, found that Darlington had been closed because of the antiunion animus of Roger Milliken, and held that to be a violation of § 8 (a)(3).[6] The Board also found Darlington to be part of a single integrated employer group controlled by the Milliken family through Deering Milliken; therefore Deering Milliken could be held liable for the unfair labor practices of Darlington.[7] Alternatively, since Darlington was a part of the Deering Milliken enterprise, Deering Milliken had violated the Act by closing part of its business for a discriminatory purpose. The Board ordered back pay for all Darlington employees until they obtained substantially equivalent work or were put on preferential hiring lists at the other Deering Milliken mills. Respondent Deering Milliken was ordered to bargain with the union in regard to details of compliance with the Board order. 139 N. L. R. B. 241.

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[5] The union asked for a bargaining conference on September 12, 1956 (the day that the board of directors voted to liquidate), but was told to await certification by the Board. The union was certified on October 24, and did meet with Darlington officials in November, but no actual bargaining took place. The Board found this to be a violation of § 8 (a)(5). Such a finding was in part based on the determination that the plant closing was an unfair labor practice, and no argument is made that § 8 (a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise. Cf. *Fibreboard Paper Products Corp.* v. *Labor Board*, 379 U. S. 203.

[6] Since the closing was held to be illegal, the Board found that the gradual discharges of all employees during November and December constituted § 8 (a)(1) violations. The propriety of this determination depends entirely on whether the decision to close the plant violated § 8 (a)(3).

[7] Members Leedom and Rodgers agreed with the trial examiner that Deering Milliken was not a single employer. Member Rodgers dissented in arguing that Darlington had not violated § 8 (a)(3) by closing.

On review, the Court of Appeals, sitting *en banc*, set aside the order and denied enforcement by a divided vote. 325 F. 2d 682. The Court of Appeals held that even accepting *arguendo* the Board's determination that Deering Milliken had the status of a single employer, a company has the absolute right to close out a part or all of its business regardless of antiunion motives. The court therefore did not review the Board's finding that Deering Milliken was a single integrated employer. We granted certiorari, 377 U. S. 903, to consider the important questions involved. We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close part of a business no matter what the reason. We conclude that the cause must be remanded to the Board for further proceedings.

Preliminarily it should be observed that both petitioners argue that the Darlington closing violated § 8 (a) (1) as well as § 8 (a)(3) of the Act. We think, however, that the Board was correct in treating the closing only under § 8 (a)(3).[8] Section 8 (a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" § 7 rights.[9] Naturally, certain business decisions will, to some

[8] The Board did find that Darlington's discharges of employees following the decision to close violated § 8 (a)(1). See n. 6, *supra*.

[9] NLRA § 7, as amended, 29 U. S. C. § 157 (1958 ed.), provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3) [section 158 (a)(3) of this title]."

degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8 (a)(1) is violated. See, *e. g., Labor Board* v. *Steelworkers*, 357 U. S. 357; *Republic Aviation Corp.* v. *Labor Board*, 324 U. S. 793. A violation of § 8 (a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. Whatever may be the limits of § 8 (a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8 (a)(1), whether or not they involved sound business judgment, unless they also violated § 8 (a)(3). Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons.[10] But such action, if discriminatorily motivated, is encompassed within the literal language of § 8 (a)(3). We therefore deal with the Darlington closing under that section.

I.

We consider first the argument, advanced by the petitioner union but not by the Board, and rejected by the Court of Appeals, that an employer may not go completely out of business without running afoul of the Labor Relations Act if such action is prompted by a desire to

[10] It is also clear that the ambiguous act of closing a plant following the election of a union is not, absent an inquiry into the employer's motive, inherently discriminatory. We are thus not confronted with a situation where the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions . . ." (*Labor Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 228), in which the Board could find a violation of § 8 (a)(3) without an examination into motive. See *Radio Officers* v. *Labor Board*, 347 U. S. 17, 42–43; *Teamsters Local* v. *Labor Board*, 365 U. S. 667, 674–676.

avoid unionization.[11] Given the Board's findings on the issue of motive, acceptance of this contention would carry the day for the Board's conclusion that the closing of this plant was an unfair labor practice, even on the assumption that Darlington is to be regarded as an independent unrelated employer. A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.

So far as legislative manifestation is concerned, it is sufficient to say that there is not the slightest indication in the history of the Wagner Act or of the Taft-Hartley Act that Congress envisaged any such result under either statute.

As for judicial precedent, the Board recognized that "[t]here is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." 139 N. L. R. B., at 250. The only language by this Court in any way adverting to this problem is found in *Southport Petroleum Co.* v. *Labor Board*, 315 U. S. 100, 106, where it was stated:

> "Whether there was a *bona fide* discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear . . . ."

The courts of appeals have generally assumed that a complete cessation of business will remove an employer

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[11] The Board predicates its argument on the finding that Deering Milliken was an integrated enterprise, and does not consider it necessary to argue that an employer may not go completely out of business for antiunion reasons. Brief for National Labor Relations Board, p. 3, n. 2.

from future coverage by the Act. Thus the Court of Appeals said in these cases: The Act "does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met." 325 F. 2d, at 685. The Eighth Circuit, in *Labor Board* v. *New Madrid Mfg. Co.*, 215 F. 2d 908, 914, was equally explicit:

> "But none of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to a remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed in the enterprise, except up to the time that such actual and permanent closing . . . has occurred." [12]

The AFL–CIO suggests in its *amicus* brief that Darlington's action was similar to a discriminatory lockout, which is prohibited " 'because designed to frustrate organizational efforts, to destroy or undermine bargaining representation, or to evade the duty to bargain.' " [13] One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. The discriminatory lockout designed to destroy a union, like a "runaway shop," is a lever which has been used to discourage collective employee activities

[12] In *New Madrid* the business was transferred to a new employer, which was held liable for the unfair labor practices committed by its predecessor before closing. The closing itself was not found to be an unfair labor practice.

[13] Brief for AFL–CIO, p. 7, quoting from *Labor Board* v. *Truck Drivers Local*, 353 U. S. 87, 93. This brief was incorporated by reference as Point I of the petitioner union's brief in this Court.

in the future. But a complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide.[14] It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act. The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed.[15] Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it a violation of the Act for the same employees to quit their employment *en masse*, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer's right to go out of business is no different.

We are not presented here with the case of a "runaway shop," [16] whereby Darlington would transfer its

[14] The Darlington property and equipment could not be sold as a unit, and were eventually auctioned off piecemeal. We therefore are not confronted with a sale of a going concern, which might present different considerations under §§ 8 (a)(3) and (5). Cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543; *Labor Board* v. *Deena Artware, Inc.*, 361 U. S. 398.

[15] Cf. NLRA § 8 (c), 29 U. S. C. § 158 (c) (1958 ed.). Different considerations would arise were it made to appear that the closing employer was acting pursuant to some arrangement or understanding with other employers to discourage employee organizational activities in their businesses.

[16] *E. g., Labor Board* v. *Preston Feed Corp.*, 309 F. 2d 346; *Labor Board* v. *Wallick*, 198 F. 2d 477. An analogous problem is presented where a department is closed for antiunion reasons but the work is continued by independent contractors. See, *e. g., Labor Board* v. *Kelly & Picerne, Inc.*, 298 F. 2d 895; *Jays Foods, Inc* v. *Labor Board*, 292 F. 2d 317; *Labor Board* v. *R. C. Mahon Co.*, 269 F. 2d 44; *Labor Board* v. *Bank of America*, 130 F. 2d 624; *Williams Motor Co.* v. *Labor Board*, 128 F. 2d 960.

work to another plant or open a new plant in another locality to replace its closed plant.[17] Nor are we concerned with a shutdown where the employees, by renouncing the union, could cause the plant to reopen.[18] Such cases would involve discriminatory employer action for the purpose of obtaining some benefit from the employees in the future.[19] We hold here only that when

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[17] After the decision to close the plant, Darlington accepted no new orders, and merely continued operations for a time to fill pending orders. 139 N. L. R. B., at 244.

[18] *E. g., Labor Board* v. *Norma Mining Corp.*, 206 F. 2d 38. Similarly, if all employees are discharged but the work continues with new personnel, the effect is to discourage any future union activities. See *Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206; *Labor Board* v. *National Garment Co.*, 166 F. 2d 233; *Labor Board* v. *Stremel*, 141 F. 2d 317.

[19] All of the cases to which we have been cited involved closings found to have been motivated, at least in part, by the expectation of achieving future benefits. See cases cited in notes 16, 18, *supra*. The two cases which are urged as indistinguishable from *Darlington* are *Labor Board* v. *Savoy Laundry*, 327 F. 2d 370, and *Labor Board* v. *Missouri Transit Co.*, 250 F. 2d 261. In *Savoy Laundry* the employer operated one laundry plant where he processed both retail laundry pickups and wholesale laundering. Once the laundry was marked, all of it was processed together. After some of the employees organized, the employer discontinued most of the wholesale service, and thereafter discharged some of his employees. There was no separate wholesale department, and the discriminatory motive was obviously to discourage unionization in the entire plant. *Missouri Transit* presents a similar situation. A bus company operated an interstate line and an intrastate shuttle service connecting a military base with the interstate terminal. When the union attempted to organize all of the drivers, the shuttle service was sold and the shuttle drivers were discharged. Although the two services were treated as separate departments, it is clear from the facts of the case that the union was attempting to organize all of the drivers, and the discriminatory motive of the employer was to discourage unionization in the interstate service as well as the shuttle service.

an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.[20]

II.

While we thus agree with the Court of Appeals that viewing Darlington as an independent employer the liquidation of its business was not an unfair labor practice, we cannot accept the lower court's view that the same conclusion necessarily follows if Darlington is regarded as an integral part of the Deering Milliken enterprise.

The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have

[20] Nothing we have said in this opinion would justify an employer's interfering with employee organizational activities by threatening to close his plant, as distinguished from announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision. We recognize that this safeguard does not wholly remove the possibility that our holding may result in some deterrent effect on organizational activities independent of that arising from the closing itself. An employer may be encouraged to make a definitive decision to close on the theory that its mere announcement before a representation election will discourage the employees from voting for the union, and thus his decision may not have to be implemented. Such a possibility is not likely to occur, however, except in a marginal business; a solidly successful employer is not apt to hazard the possibility that the employees will call his bluff by voting to organize. We see no practical way of eliminating this possible consequence of our holding short of allowing the Board to order an employer who chooses so to gamble with his employees not to carry out his announced intention to close. We do not consider the matter of sufficient significance in the overall labor-management relations picture to require or justify a decision different from the one we have made.

repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the "runaway shop" and "temporary closing" cases. See *supra*, pp. 272–273. Moreover, a possible remedy open to the Board in such a case, like the remedies available in the "runaway shop" and "temporary closing" cases, is to order reinstatement of the discharged employees in the other parts of the business.[21] No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under § 8 (a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.

While we have spoken in terms of a "partial closing" in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of § 8 (a)(3). If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and

[21] In the view we take of these cases we do not reach any of the challenges made to the Board's remedy afforded here.

(3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained by the Court of Appeals, would satisfy the elements of "interest" and "relationship" with respect to other parts of the Deering Milliken enterprise, that and the other Board findings fall short of establishing the factors of "purpose" and "effect" which are vital requisites of the general principles that govern a case of this kind.

Thus, the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained *only* to its impact on the Darlington employees. No findings were made as to the purpose and effect of the closing with respect to the employees in the other plants comprising the Deering Milliken group. It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally [22] does not amount to a violation of § 8 (a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect. See *Teamsters Local* v. *Labor Board*, 365 U. S. 667, and the concurring opinion therein, at 677. In an area which trenches so closely upon otherwise legitimate employer prerogatives, we consider the absence of Board findings on this score a fatal defect in its decision. The Court of Appeals for its part

[22] See n. 10, *supra*.

did not deal with the question of purpose and effect at all, since it concluded that an employer's right to close down his entire business because of distaste for unionism, also embraced a partial closing so motivated.

Apart from this, the Board's holding should not be accepted or rejected without court review of its single employer finding, judged, however, in accordance with the general principles set forth above. Review of that finding, which the lower court found unnecessary on its view of the cause, now becomes necessary in light of our holding in this part of our opinion, and is a task that devolves upon the Court of Appeals in the first instance. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474.

In these circumstances, we think the proper disposition of this cause is to require that it be remanded to the Board so as to afford the Board the opportunity to make further findings on the issue of purpose and effect. See, *e. g.*, *Labor Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469, 479–480. This is particularly appropriate here since the cases involve issues of first impression. If such findings are made, the cases will then be in a posture for further review by the Court of Appeals on all issues. Accordingly, without intimating any view as to how any of these matters should eventuate, we vacate the judgments of the Court of Appeals and remand the cases to that court with instructions to remand them to the Board for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the decision of these cases.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of these cases.

DARLINGTON MANUFACTURING COMPANY; Deering Milliken & Co., Inc., and Deering Milliken, Inc., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Textile Workers Union of America, AFL-CIO, Intervenor.

No. 11554.

United States Court of Appeals
Fourth Circuit.

Argued Dec. 5, 1967.

Decided May 31, 1968.

Proceeding on petition to review and set aside, and on cross application to enforce, an order of the National Labor Relations Board. The Fourth Circuit Court of Appeals denied enforcement, 325 F.2d 682. The United States Supreme Court vacated the judgments of the Court of Appeals, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, and remanded the cases to the board with directions. Following entry of second order by the board, petitions to review and set aside and to enforce were again filed. The Court of Appeals, Butzner, Circuit Judge, held that evidence supported NLRB findings that textile mills, including mill closed after union election, were operated by single employer; that closing was motivated by purpose to discourage unionism in remaining mills rather than for economic reasons; that such chilling effect was realistically foreseeable; and that closing of mill amounted to "discriminatory partial closing" in violation of National Labor Relations Act.

Enforcement granted.

Albert V. Bryan and Boreman, Circuit Judges, dissented.

Haynsworth, Chief Judge, concurred specially.

the net market loss test. He deplored the test's regulatory inflexibility and called for its re-examination.

1. Labor Relations ⇐392

That approximately one-third of stock of corporation which closed its plant was owned by persons who were not members of family which controlled numerous textile plants was not conclusive of whether such corporation and other family controlled corporations could be considered single employer for purpose of determining whether closing was discriminatory; identity of ownership may be indicium of single employer status, but it is not indispensable. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

2. Labor Relations ⇐392

Antiunion animus in single employer's closing of one plant in larger enterprise does not establish discriminatory partial closing prohibited by National Labor Relations Act; showing of motivation to chill unionism in remaining plants of enterprise is also required. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

3. Labor Relations ⇐541

Memorandum directing managers of textile mills associated in single enterprise to review their public relations in light of enclosures emphasizing that union representation would lead to closure of mills was not merely expression of views, argument or opinion of director of enterprise and was admissible to determine motive in closing one plant after union election. National Labor Relations Act, § 8(c), 29 U.S.C.A. § 158(c).

4. Labor Relations ⇐541

Speeches of director of textile enterprise expressing his belief that textile industry should remain nonunionized were admissible before NLRB to draw background of controversy resulting from alleged discriminatory partial closing and place other nonverbal acts in proper perspective. National Labor Relations Act, § 8(c), 29 U.S.C.A. § 158(c).

5. Labor Relations ⇐575

Even if admission of speeches of director of textile enterprise was improper, admission did not require that enforcement of board's order entered upon its determination that there had been discriminatory partial closing be denied where such speeches revealed nothing of substance not shown by other evidence. National Labor Relations Act, § 8(c), 29 U.S.C.A. § 158(c).

6. Labor Relations ⇐541

Speeches of director of textile enterprise which were not themselves unfair labor practices and which were utilized by NLRB only to clarify and shed light on events which occurred within six months limitation period could be considered by board without regard to such period. National Labor Relations Act, § 10(b), 29 U.S.C.A. § 160(b).

7. Labor Relations ⇐575

Neither fact that textile plant had operated at loss nor fact that all directors of corporation testified to effect that plant was not closed to chill unionism compelled conclusion that plant was closed for economic reasons and was not discriminatory partial closing. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

8. Labor Relations ⇐392

That closing of textile plant may not have been motivated wholly by purpose to chill unionism did not impair determination that closing was discriminatory. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

9. Labor Relations ⇐392

Contemporaneous organizational activity in other textile plants operated by single enterprise was not prerequisite to finding unfair labor practice resulting from closing of one plant after union election; it was sufficient if employer anticipated such activity in reasonably near future. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

10. Labor Relations ⇐392

Discriminatory partial closing of enterprise may be established without proof of subjective effect on employees in remaining elements of enterprise. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

11. Labor Relations ⇐575

Evidence supported NLRB findings that textile mills, including mill closed after union election, were operated by single employer; that closing was motivated by purpose to discourage unionism in remaining mills rather than for economic reasons; that such chilling effect was realistically foreseeable; and that closing of mill amounted to "discriminatory partial closing" in violation of National Labor Relations Act. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

See publication Words and Phrases for other judicial constructions and definitions.

12. Labor Relations ⇐629

Upon finding of discriminatory partial closing, NLRB was not without authority to order payment of back wages until employees obtained substantially equivalent employment or were put on preferential hiring list by single employer. National Labor Relations Act, § 8(a) (3), 29 U.S.C.A. § 158(a) (3).

13. Labor Relations ⇐704

That NLRB hearing examiner recommended dismissal of complaint charging discriminatory partial closing did not require that NLRB's back pay award be tolled.

14. Labor Relations ⇐710

Where discriminatory partial closing was shown, remedy could be enforced against corporations in single enterprise in addition to corporation whose plant was closed.

15. Labor Relations ⇐556, 557, 561, 594

Evidence supported NLRB's findings that employer was guilty of unfair labor practices in threatening employees that textile mill would be closed if union won election, told employees after election that mill had been closed for this reason, supported petition to disallow union, interrogated employees with respect to their activities in behalf of union, refused to bargain, made discriminatory discharges, and refused to bargain with respect to tenure of employment and refused to furnish board with wage and related information. National Labor Relations Act, § 8(a) (1, 3, 5), 29 U.S.C.A. § 158(a) (1, 3, 5).

Thornton H. Brooks, Greensboro, N. C., (McLendon, Brim, Brooks, Pierce & Daniels, Greensboro, N. C., on the brief) for Darlington Manufacturing Co.

John R. Schoemer, Jr., and Stuart N. Updike, New York City, (John D. Canoni, Bronxville, N. Y., on the brief) for Deering, Milliken, Inc., and Deering, Milliken and Co., Inc.

Frank H. Itkin, Atty., N. L. R. B., (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Nancy M. Sherman, Atty., N. L. R. B., on the brief) for respondent.

Daniel B. Jordan, Gen. Counsel, Textile Workers Union of America, AFL–CIO, for intervenor.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

BUTZNER, Circuit Judge.

Soon after the Textile Workers Union won an election at Darlington Manufacturing Co., stockholders liquidated and dissolved the corporation. In Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965), the Court held that an employer does not engage in an unfair labor practice when he permanently closes his entire business, even if the liquidation is motivated by vindictiveness toward a union. A partial closing, however, "is an unfair labor practice under § 8(a) (3) [1] if motivated by a

1. 29 U.S.C. § 158(a) (3), which provides in pertinent part:
"(a) It shall be an unfair labor practice for an employer—
"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."[2] The Court remanded the case to allow the National Labor Relations Board to make findings on the purpose and effect of the closing and to afford this court an opportunity to review the Board's single employer finding and the remedy it proposed.[3]

Upon remand, the Board, disagreeing with the trial examiner,[4] found the persons controlling Darlington had sufficient interest and relationship with Deering Milliken, Inc., and other affiliated corporations, to establish a single enterprise; and that Darlington's closing was accomplished under circumstances that established the factors of "purpose" and "effect" with respect to chilling unionism in other mills of the Deering Milliken group. Consequently, the Board concluded that the closing of Darlington's mill was the partial closing of a business in violation of § 8(a) (3). The Board ordered Darlington and Deering Milliken to pay back wages until the employees obtained substantially equivalent employment or were put on a preferential hiring list by Deering Milliken.

The case is before us on the joint petition of Darlington and Deering Milliken to review and set aside the Board's order and on the cross-application of the Board for enforcement. We hold the Board correctly applied the precepts governing remand and that the Board's findings are supported by substantial evidence on the record as a whole. Accordingly, we enforce the Board's order.

I.

When this case was last before us, we did not review the Board's finding that Darlington and Deering Milliken, affiliated corporations, were a single employer, because we concluded that an employer had an absolute prerogative to terminate its business permanently in whole or in part.[5] Now, however, the single employer issue is crucial, for if Darlington were independent, the liquidation of its business would not be an unfair labor practice. The same conclusion does not necessarily follow, however, if "Darlington is regarded as an integral part of the Deering Milliken enterprise."[6]

Mr. Justice Harlan, writing for the Court, stated the criteria that determine the employer's status, and the elements

2. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 275, 85 S.Ct. 994, 1002 (1965).

3. Charges were filed against Darlington on October 10, 1956. Pertinent reported decisions, culminating in the present petition for review, occurred in the following order:
Darlington Mfg. Co., 119 NLRB 1069, 41 LRRM 1205 (1957) (remand for further proceedings before trial examiner).
Darlington Mfg. Co., 139 NLRB 241, 51 LRRM 1278 (1962) (Board's finding of unfair labor practice, and order).
Darlington Mfg. Co. v. NLRB, 325 F.2d 682 (4th Cir. 1963) (enforcement denied).
Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965) (remand for further proceedings).
Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391 (1967) (Board's supplemental decision. The Board did not modify the order entered in 1962).
See also Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961), modifying 193 F.Supp. 741 (M.D.N.C. 1961) for a concise statement of the history of this litigation to that date.

4. While agreeing that the mill would not have closed "but for the protected organizational activities" of Darlington's employees, the Board and the trial examiner reached different conclusions on single employer status and chilling purpose and effect. We have considered the trial examiner's findings in our review of the record as a whole, and we conclude that these findings are of insufficient force to *destroy the substantiality* of evidence upon which the Board's decision rests. Universal Camera Corp. v. NLRB, 340 U.S. 474, 493, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

5. Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 685 (4th Cir. 1963).

6. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 274, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965).

that must be established to show an unfair labor practice; [7]

"While we have spoken in terms of a 'partial closing' in the context of the Board's finding that Darlington was part of a larger single enterprise controlled by the Milliken family, we do not mean to suggest that an organizational integration of plants or corporations is a necessary prerequisite to the establishment of such a violation of § 8(a) (3). If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.

"Although the Board's single employer finding necessarily embraced findings as to Roger Milliken and the Milliken family which, if sustained by the Court of Appeals, would satisfy the elements of 'interest' and 'relationship' with respect to other parts of the Deering Milliken enterprise, that and the other Board findings fall short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind."

The facts leading to the Board's finding of a single employer previously have been published.[8] Repetition of all the details is unnecessary. Darlington was chartered by South Carolina in 1883. It operated a mill in Darlington, South Carolina, for the manufacture and sale of cotton greige goods. It had no other plant or office. In 1937, Deering Milliken & Co., a New York corporation,[9] acquired 41% of Darlington's stock through a bankruptcy proceeding. The majority stockholders of Deering Milliken & Co. were members of the Milliken family. In 1956, when Darlington was closed, members of the Milliken family, through their majority ownership of Deering Milliken and Cotwool Manufacturing Corp., and their individual Darlington holdings, controlled about 66% of Darlington's stock.

The Milliken family controlled 17 corporations operating 27 textile mills, of which 20, including Darlington, were in South Carolina. Directors of Deering Milliken constituted a majority of the boards of directors of the mill corporations except one. Deering Milliken was the exclusive sales agent and factor of all 27 mills. It had no non-Milliken clients. The head of Deering Milliken's tax department was an officer of each corporation. Deering Milliken's insurance department handled insurance for the mills. A single workmen's compensation policy and a single fire policy covered all mills. One attorney advised all mills on labor relations. Products of the mills were sold under the name, "Milliken." Two wholly owned subsidiaries, Deering Milliken Service Corporation, and The Deering Milliken Research Corporation, conducted surveys, inspections, research, and studies for the benefit of all mills. They developed a standard cost system and a uniform preventive maintenance program, and set production goals. The subsidiaries purchased

7. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 275, 85 S.Ct. 994, 1001, 13 L.Ed.2d 827 (1965).

8. See Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 687 (4th Cir. 1963) (dissenting opinion); Darlington Mfg. Co., 139 NLRB 241, 51 LRRM 1278 (1962); Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1301 (1967).

9. In 1960, Deering Milliken & Co., and Cotwool Manufacturing Corp. merged, forming Deering Milliken, Inc., a Delaware corporation.

machinery, equipment and cotton, and recruited supervisory and technical trainees for the mills. The day to day manufacturing operations were conducted by the mill treasurers, who were the chief executive officers at each mill. They were granted considerable authority in hiring, firing, wage rates and pricing. They recognized, however, that they were a part of the Deering Milliken group.[10] After Darlington was closed, arrangements were made to carry Darlington supervisory personnel on the payroll of the Deering Milliken Industrial Engineering Department for a three-month period, within which they could be picked up by other Deering Milliken mills. A number of the supervisors were transferred to positions in the Deering Milliken organization.

Roger Milliken was president of Deering Milliken and all the mill corporations except one, for which he served as vice president and member of the board. He was president of Darlington at the time it closed. He kept himself well-informed and frequently advised the mill treasurers on nearly every phase of the mills' operations. No one expressed better than Milliken that he was the head of a well-integrated single enterprise. He wrote of the necessity of "goals for each of the mills in the organization" as a proper subject for discussion at the next meeting of the mill treasurers. He planned to hold quarterly meetings "of all our mills at which each one of them will make a presentation to the group of what they have accomplished * * *." He went on to say, "So many of the policies of the whole company are developed at meetings like this that I think it would be extremely valuable if you could plan to be present and thus know of all the things that are being done to make the manufacturing of Deering Milliken as outstanding as possible."

Darlington and Deering Milliken have argued that lack of common control of labor policy and absence of substantial identity of ownership negate the Board's single employer finding. The record viewed as a whole supports the Board's finding that Milliken exercised ultimate control over the labor relations of all the corporations. Milliken did not limit his participation in a uniform labor policy to a mere statement of views. For example, when he felt it necessary to clarify a uniform policy on payroll deductions, he issued a directive calling upon his mill officers to observe the group's policy. One attorney, J. D. Poag, represented and advised all mills on labor relations. His employment was not the result of coincidental action taken by independent mill treasurers. Poag enjoyed Milliken's confidence and had authority to speak for him. In opposing union organization at Darlington, Poag reflected Milliken's policy for all mills, not just Darlington. Finally, it was Milliken, not the treasurer of Darlington, who initiated and pressed the closing of the mill after the union's victory.

[1] The fact that approximately 33% of Darlington's stock was owned by persons who were not members of the Milliken family does not of necessity lead to the conclusion that Darlington and the Deering Milliken affiliated corporations cannot be considered a single employer for the purpose of determining whether § 8(a) (3) was violated. Neither the Board nor the courts have applied a simple mechanistic test of stock ownership to determine single employer status. Identity of ownership may be an indicium of this status, e. g., NLRB v. Calcasieu Paper Co., 203 F.2d 12 (5th Cir. 1953), but it is not indispensable

10. For example, the mill treasurer of Darlington, in reporting to the corporation's president, mentioned that pay on a number of jobs "was well above the average of competitive mills within the Deering Milliken group and information we had received on other mills; that we had known for some time that the pay of our overseers was less than the other D. M. mills," and that even with the increases that he proposed, the supervisors' salaries would be "under the mills in the D. M. group."

NLRB v. Gibraltar Industries, Inc., 307 F.2d 428 (4th Cir. 1962), cert. denied, 372 U.S. 911, 83 S.Ct. 724, 9 L.Ed.2d 719 (1963). The Milliken family controlled sufficient stock in the several corporations of the Deering Milliken group to effectively shape the corporate structure of the enterprise. As Judge Bell pointed out in his dissent, the evidence "indicates that the separate corporate entities of the Deering Milliken complex were largely paper corporations that could be shifted and changed at the convenience of the Milliken family." [11] Moreover, the Court in Darlington expressly stated that an organizational integration of plants or corporations is not a necessary prerequisite to establish a violation of the Act.[12]

We hold that the evidence considered as a whole supports the Board's single employer finding, which in turn satisfies the elements of "interest" and "relationship", which the Supreme Court required as a predicate to proof of a § 8(a) (3) violation.[13]

II.

The Board found that Darlington's closing was motivated by a purpose to discourage unionism in the remaining Milliken mills. With respect to this element the Court pointed out: [14]

> "It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necesarily had an adverse impact upon unionization in such other plants. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a) (3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect."

In March 1956 the union began a campaign at Darlington. The mill treasurer promptly informed Milliken, who in turn asked J. D. Poag to go to Darlington and advise the mill treasurer during the campaign. Management waged a vigorous campaign against the union. Included in its tactics were supervisors' threats that the plant would close if the union won.[15] The union won the election on September 6, 1956. The supervisors' predictions were immediately realized. The day after the election Milliken decided he would recommend to Darlington's directors and stockholders that they close the plant. At a special meeting on September 12 that lasted about 75 minutes, the directors resolved to liquidate Darlington and called a special meeting of stockholders to approve the proposal.[16] The stockholders met on October 17. Milliken opened the meeting with the statement that when the employees voted for a union he decided to close the mill. A majority of the stockholders approved the resolution to liquidate. After the meeting a person opposed to closing pointed out to Milliken that 83% of the employees had signed a petition to go back to work whether or not they had a union. Milliken responded, "As long as there are 17% of these hardcore labor people here I refuse to run the mill."

The mill was closed in November and its assets were sold piecemeal at public

11. Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 689 (4th Cir. 1963) (dissenting opinion).

12. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 275, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965).

13. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 276, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965).

14. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 276, 85 S.Ct. 994, 1003, 13 L.Ed.2d 827 (1965).

15. The trial examiner and the Board found these threats violated § 8(a) (1) [29 U.S.C. § 158(a) (1)].

16. Besides Roger Milliken, the board of directors of Darlington included Milliken's brother, uncle, and cousin, all of whom were officers and directors of Deering Milliken in New York. The other Darlington directors were mill treasurer, J. M. Oeland; retired mill treasurer, W. S. Nicholson, and J. H. Lyles, a businessman in the city of Darlington.

auction December 12 and 13. The employees were discharged.

[2] Anti-union animus alone does not establish the petitioners' violation of § 8(a) (3). Moreover, it is insufficient to show only the impact of the closing on Darlington employees. The Supreme Court required a showing of motivation to chill unionism in remaining plants of the Deering Milliken enterprise. The Board's finding that this motive was present is supported by the record as a whole.

The use of prior closings to chill unionism was not unknown in the Deering Milliken group. During the Darlington election campaign the history of Deering Milliken's closed plants was exploited to raise the spectre of Darlington's closing. Poag told the supervisors that Milliken had not said what he would do as far as Darlington was concerned. He added, however, that other mills had closed down where Milliken "had tried to operate with the union." [17] The supervisors understood the message. The record discloses numerous instances in which they told employees that Milliken had closed other mills because of unionization and that he would do the same at Darlington.

The chilling effect of plant closing was part and parcel of Darlington's anti-union campaign. Significantly this tactic did not end with Darlington's election. On November 14, 1956, after the decision to close Darlington, Milliken sent a memorandum to thirty-six mill treasurers and other officials of Deering Milliken affiliated corporations that stated:

"Attached hereto is an article from the November eighth issue of *America's Textile Reporter*. I am sending it to you in case you have not had an opportunity to see it. It is apparent from this article that this magazine made a real investigation in Darlington, and for that reason, I think the article is interesting.

"While this article shows that the union leader definitely misled the people, it also points out that the mill was negligent in its public relations. I hope that you will read this second part of the article carefully and review in your mind the steps that you are taking to bring about an understanding of your mill and its problems in your community. The unions are going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do."

The article Miliken commended was headlined, "Darlington Situation Becomes Object Lesson to All Concerned." The article spoke of the "workers' unfortunate choice" and reported that business in the town of Darlington was depressed because the mill had closed. It stressed the need and value of good public relations as a lesson to be learned from the Darlington affair. Milliken also enclosed an editorial from *America's Textile Reporter* of the same date as the article, which said in part:

"If the people of Darlington knew anything of the Deering Milliken record they would know that management does not intend an unprofitable division nor has it intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken operations. When the Madison

17. J. M. Ocland, Darlington's mill treasurer, testified concerning Poag's address to the supervisors before the election:
"Q. Did Mr. Poag ever say you can tell the employees what had happened in some of these other plants, but you cannot tell them that the plant closed down on account of the union? A. He made the statement that Mr. Milliken had not said what he would do as far as Darlington was concerned.
"Q. Right. A. But that there had been other mills that had closed down.
"Q. He did mention that fact? A. Yes, that other mills had closed down where Mr. Milliken had tried to operate with a union."

Woolen Mills of Madison, Maine, became not only unprofitable but unionized. Mr. Gerrish Milliken liquidated it, although the Cowan and Farnsworth Mills in the State of Maine still operate and must, therefore, be profitable. When the Dallas Manufacturing Company of Huntsville, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election vote was announced that we would receive a call for a special meeting to vote for liquidation."

Milliken also enclosed a news clipping that reported the permanent closing of a unionized mill in Massachusetts.

The Board found that the memorandum and its attachments were important on two counts. First, they demonstrated Milliken's opinion that the unions were in the process of mounting a drive through the area, and second, the results of a failure of public relations were made clear. Milliken drove home to the mill managers the tradition of three generations of Millikens who closed unionized mills in Maine, Alabama, and Darlington. Milliken's memorandum, however, was not limited to the dissemination of his views. It contained a directive to review the steps being taken to bring about an understanding in the community of the Deering Milliken mills and their problems. It stressed the importance of the mill treasurers' "making sure that the leaders in your community understand and are sympathetic to what they are trying to do." The Board commented, "The only way that community leaders could make use of this information would be by impressing upon employees the risks of unionism; an emphatic and timely example of those risks was Darlington." [18]

Deering Milliken urges that the Board's reliance upon Milliken's memorandum and two of his speeches was impermissible under § 8(c) of the Act.[19]

[3] The memorandum was admissible. It was not merely the expression of Milliken's views, argument or opinion, which alone are privileged under § 8(c). The memorandum was a directive to the mill treasurers and other officials to review their public relations in the light of the enclosures. The enclosures emphasized that union representation leads to the closure of Deering Milliken mills.

Milliken's memorandum falls within the exclusions from § 8(c) about which Senator Taft wrote in his Memorandum of Legislative Intent dated June 5, 1947: [20]

"It should be noted that this subsection is limited to 'views, arguments or opinions' and does not cover instructions, directions, or other statements which might be deemed admissions under ordinary rules of evidence. In other words, this section does not make incompetent, evidence which would ordinarily be deemed relevant and admissible in courts of law."

The distinction Senator Taft drew is emphasized by his further remarks: [21]

"It has been argued, however, that the prohibition against using expressions of opinion as evidence goes must further than the rules with respect to admissibility in a criminal or civil trial. Senators making this argument overlook the fact that the privilege of this subsection is limited to expression

18. Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391, 1308 (1967).

19. Title 29 U.S.C. § 158(c)—"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

20. 2 Legislative History, National Labor Relations Act, 1947, p. 1541 (Government Printing Office 1948).

21. 2 Legislative History, National Labor Relations Act, 1947, p. 1624 (Government Printing Office 1948).

of 'views, arguments, or opinion.' It has no application to statements which are acts in themselves or contain directions or instructions."

We conclude that Milliken's memorandum of directions and instructions, and its illustrative enclosures, written after the decision to close the plant had been taken, were not simply an expression of his views, arguments or opinions. Section 8(c) did not render the memorandum and its attachments inadmissible.[22]

[4] The Milliken speeches stand on a different footing. Both speeches, delivered to businessmen and state officials months before the Darlington election, disclosed Milliken's belief that the textile industry in South Carolina should remain non-unionized. The Board carefully limited its consideration of these speeches, saying: [23]

"Whatever limitations Section 8(c) might impose in other circumstances upon the use of employer expressions of antiunion sentiment, the purpose for which we here consider these speeches does not violate that provision. In this case, we look to Milliken's speeches not simply as proof that he closed Darlington because of the Union (a settled matter, we believe), but as evidence of both his apprehension of an anticipated large-scale union campaign and of his belief that an industry-wide response was imperative. These two speeches clarify the scope and breadth of the antiunion considerations which led to the Darlington closing, and we think that Section 8(c) was not intended to interdict evidence offered for this purpose."

We believe that § 8(c) did not prohibit the Board from considering the speeches for the limited purposes mentioned in its decision. The use of protected statements "to draw the background of the controversy and place other nonverbal acts in proper perspective" has been sanctioned.[24]

[5] Even if § 8(c) is considered to bar the speeches, their admission does not require that enforcement of the Board's order be denied. The speeches revealed nothing of substance not shown by other evidence. The speeches neither add to, nor detract from, the evidence necessary to support the Board's decision.

[6] Deering Milliken also argues that the six-months' limitation found in § 10(b) [29 U.S.C. § 160(b)] proscribes the Board's use of the speeches. Neither speech, however, was an unfair labor practice. The unfair labor practices found by the Board were well within the six-months' limitation period. The speeches were utilized only to clarify and shed light on events which occurred within the limitations period. This use is not prohibited by § 10(h). See Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411, 416, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960) (dictum); NLRB v. Craig-Botetourt Elec. Coop., 337 F.2d 374 (4th Cir. 1964).

[7] The petitioners, Darlington and Deering Milliken, urge that the mill was closed for economic reasons. They point out that in August 1956, a month before the union election, the mill treasurer reported an estimated loss of $40,000 for the current year. It also appeared that a loss of $240,000 could be anticipated for the following year. The petitioners stress that Darlington was an old mill, that it had lost its traditional market, that foreign imports adversely affected

22. Cf. Linn v. United Plant Guard Workers, etc., 383 U.S. 53, 62 n. 5, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

23. Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391, 1397 (1967).

24. Internal Union UAW etc. v. NLRB, 124 U.S.App.D.C. 215, 363 F.2d 702, 707 cert. denied, Aero Corp. v. N.L.R.B., 385 U.S. 973, 87 S.Ct. 510, 17 L.Ed.2d 436 (1966); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 103 (5th Cir. 1963). But cf. NLRB v. Colvert Dairy Products Co., 317 F.2d 44 (10th Cir. 1963); NLRB v. Rockwell Mfg. Co., 271 F.2d 109 (3rd Cir. 1959), where protected statements could not be used to appraise the credibility of witnesses, or to find otherwise proper interrogatories and statements coercive.

its competitive position, that it was faced with low market prices and high production costs, and that a modernization program would be expensive and would meet with employee resistance.

After reviewing testimony supporting these allegations, we conclude that it did not require the Board to find Darlington was closed because of economic factors. During the first nine months of 1956 a capital improvement program involved expenditures in the amount of $400,000. In September 1956 construction changes were being undertaken to accommodate newly purchased looms. The mill continued to operate and the capital improvement program was uninterrupted until after the employees voted to join the union. Milliken did not call a special meeting of the board of directors to close the company or halt the capital improvement program when he learned of the prospective $40,000 loss. Despite the economic problems the petitioners stress, three directors were not told before the meeting in September 1956 that a plant closing was under consideration. From these and other facts mentioned elsewhere in this opinion, we find adequate support for the Board's finding that the decision to close the mill was not based on economic factors, and that it would not have been made but for the protected organizational activities of the employees.

Darlington points out that all the directors testified to the effect that the plant was not closed to chill unionism.[25] It suggests that the Board concentrated exclusively on Milliken's motive and that "to assume that six of Darlington's seven directors voted for liquidation merely because Roger Milliken proposed it is to assume, without support in the record, that they unlawfully ignored their fiduciary duties." We do not find this argument persuasive. The record shows that Milliken interests controlled Darlington and that Roger Milliken occupied a dominant role in the management and control of these interests. The Board did not have to shut its eyes to the fact that corporate directors are frequently responsive to interests that control the majority of a corporation's stock. This response does not necessarily demonstrate breach of the directors' fiduciary duties. Furthermore, it was the stockholders who ultimately liquidated the corporation. The Milliken interests held control of the corporation and voted a majority of the stock for liquidation. Some non-Milliken stock, unnecessary to produce a majority, was also voted for a liquidation. Other minority stockholders who had no interest in the remaining Deering Milliken mills voted against liquidation.

[8] The Board found "the closing of Darlington was, at least in part, the product of a desire to discourage unionism among employees at other Deering Milliken Mills."[26] Deering Milliken argues that the Board's decision is fatally defective because it fails to find that a chilling purpose was the predominant, or at least substantial and determining, cause of the Darlington closing. Deering Milliken asserts, "The theme that ran throughout

25. The trial examiner did not credit or discredit this testimony. Concerning it he said:

"The statements of purpose are negative, and whoever would regard them with skepticism cannot rely on them as proving the contrary. The testimony now received from the Darlington directors and stockholders supports the original finding that Darlington would not have been liquidated in 1956 but for the Union and its election victory."

26. Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391, 1399 (1967). The Board had previously found and unequivocally stated "that the election of the union was a substantial cause of the plant's closing." Darlington Mfg. Co., supra 65 LRRM at 1394. Anti-union animus need not be the sole cause of the employer's conduct in order to establish a violation of § 8(a) (3). It is sufficient if it is the moving cause, a substantial cause, or the immediate cause. See Filler Products, Inc. v. NLRB, 376 F.2d 369, 377 (4th Cir. 1967); NLRB v. Associated Naval Architects, Inc., 355 F.2d 788, 792 (4th Cir. 1966); and NLRB v. Preston Feed Corp., 309 F.2d 346, 350 (4th Cir. 1962).

[the Board's] 1962 decision was that the dominant motive behind the closing was the punishment of Darlington's employees for exercising their § 7 rights. * * * [The Board] cannot consistently now say that but for a purpose to chill elsewhere, Darlington would not have closed." (Brackets added)

We do not find the Board's position in 1962 to be mutually exclusive of the position that it took in 1967. In 1962 the Board viewed Darlington's reprisal against its own employees as prohibited discrimination. Consequently, there was no occasion for the Board to consider whether the Deering Milliken interests pursued the compatible objective of thwarting unionization at other plants. Nevertheless, the record, as it existed in 1962, was not wholly devoid of evidence that showed the chilling purpose of Darlington's closing. When this case was previously before the court, two dissenting judges pointed out:[27]

> "The Darlington mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to thousands of employees in the affiliated plants who might entertain similar notions of unionization."

We conclude it was sufficient for the Board to find that the election of the union was a substantial cause of Darlington's closing and that the employer was actually motivated, at least in part, by a purpose to chill unionism in other Deering Milliken mills. The coexistence of this chilling purpose with an anti-union purpose directed against Darlington employees does not impair the Board's decision.[28]

III.

Finally, the Board found "that the relationship of the persons closing Darlington to the other businesses was such as to make it realistically foreseeable that employees of the latter would fear that their mills also would be closed if they engaged in organizational activity; that the persons exercising control over Darlington did, in fact, foresee and intend this effect, and that a number of these employees were, in all likelihood, so affected."[29]

Deering Milliken contends that a violation of the Act must be predicated upon a finding that an organizing campaign was actually under way in the employer's remaining businesses at the time of the closing. It buttresses this argument by quoting from the Supreme Court's opinion, "[It must be] realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities * * *."[30] Deering Milliken argues, "Actions which are being persisted in are actually occurring, not foreseeable," and there is a "difference between the realization of an immediate benefit (cooling off a current union campaign) and a future one (discouraging the union from starting a hypothetical campaign at some future and unknown date)."

Along with the Board, we do not read such a fine distinction in the word *persist*. Motor Repair, Inc., 168 NLRB No. 148, 67 LRRM 1051 (1967), illustrates the Board's rule. There the employer closed its Birmingham repair shop (one of six it operated) and discharged its employees there "to penalize them for having selected the union as their bargaining agent." The trial examiner found this conduct violated § 8(a) (3).

27. Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 691 (4th Cir. 1963) (dissenting opinion).

28. See Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 273 n. 19, 85 S.Ct. 994, 13 L.Ed.2d 827 (1967); NLRB v. Preston Feed Corp., 309 F.2d 346, 350 (4th Cir. 1962).

29. Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391, 1405 (1967).

30. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 276, 85 S.Ct. 994, 1003, 13 L.Ed.2d 827 (1965).

The Board found that the closing was not an unfair labor practice, saying:

"Having reviewed the record in the light of the foregoing tests [Textile Workers [Union of America] v. Darlington [Mfg. Co.], 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965)], we conclude that the evidence does not preponderate in favor of a finding that, in closing the Birmingham shop, Respondent was motivated by a desire to chill unionism at its other shops. Thus, there is no evidence that contemporaneous union activity existed at other shops, or that the union's organization of the Birgingham shop was a first step, *or was believed by Respondent to be a first step, of an effort to organize all of the shops.*" (Emphasis added.)

[9] We hold that contemporaneous organizational activity in the other plants is not a prerequisite to finding an unfair labor practice. It is sufficient if the employer anticipated such activity in the reasonably near future. Proof of this is supplied by Milliken's memorandum of November 14, 1956, "The unions are going to be making a tremendous drive all through this area * * *."

There can be no doubt that the persons controlling Darlington could realistically foresee that news of its closing soon after the election would be communicated to many other Deering Milliken employees. Even before the stockholders' meeting, the directors' recommendation was reported extensively throughout South Carolina, where Deering Milliken had nineteen other affiliated mills, one of which was only fourteen miles from Darlington. Predictably, news of the stockholders' meeting and the auction of the plant equipment was widely published. The testimony of employees at other Deering Milliken mills justifies the Board's finding that "conversations about Darlington between employees, and between employees and supervisors, were commonplace at other mills, and this might well be expected." [21] Discussion of Darlington included the prophecy that other mills would be closed if they were organized.

In reaching its decision, the Board concluded it was unnecessary to show the subjective effect of the Darlington closing on other Deering Milliken employees. Instead the Board reasoned that it should apply the usual standard of whether the closing had a natural tendency to discourage union adherents in other plants.

The petitioners contend that the Board (but not the trial examiner) misread its instructions from the Supreme Court and that an actual chilling effect was required to be shown. Pointing to the 30,000 mill employees, Deering Milliken asserts, "The fatal defect in the Board's finding as to 'effect' is that not one witness was found to testify that he was discouraged by the Darlington closing from persisting in, or even initiating, any organizational activities in his own mill."

[10, 11] We believe the standard the Board adopted is proper. The Supreme Court did not remand to determine the subjective effect of the closing on employees at other Deering Milliken mills. Instead, it spoke in terms of an effect that was realistically or reasonably foreseeable. The Board carefully distinguished between the employer's subjective motive, interest or purpose to chill unionism elsewhere—which has been

21. Darlington Mfg. Co., 165 NLRB No. 100, 65 LRRM 1391, 1403 (1967).

We have considered the petitioners' attack on the credibility of these witnesses. Although discrepancies appear in their testimony, the Board's conclusion that the discussion of Darlington's closing was widespread throughout the other plants was clearly warranted. The witnesses testified to events that occurred almost a decade before. Recognizing this difficulty, the trial examiner said: "Should detailed findings concerning each witness' testimony be deemed necessary, although I deem it unlikely where the sum total is so slight, they can be made free of my own impression of inadequacies and without any confirmatory evaluations of witnesses' demeanor."

shown [32]—and the subjective effect on employees in remaining mills—which need not be shown. To adopt the view expressed by Deering Milliken would require a subjective probing of employees, previously deemed unnecessary.[33]

IV.

[12] To remedy the violation the Board directed Deering Milliken to offer to rehire the Darlington employees at other mills, to pay their transportation expenses, or if work were not available, to put them on a preferential list for hiring. The Board also ordered Darlington and Deering Milliken to make whole the employees for any loss of pay until they obtained substantially equivalent employment or were placed on Deering Milliken's preferential hiring list.[34] The Supreme Court did not pass upon the Board's order. It did, however, suggest "a possible remedy open to the Board in such a case, like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business." [35]

We find the remedy is appropriate. Requiring reinstatement and back pay is not an innovation. Substantially similar remedies, albeit involving fewer employees, were ordered in NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957) (partial closing of a business); NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962) (runaway shop); and NLRB v. Wallick, 198 F.2d 477 (3rd Cir. 1952) (runaway shop).

The Board deemed the back pay award essential to rectify the violation of § 8(a) (3). It did not, however, order the back pay to run until reinstatement occurred, which is the customary remedy for discriminatory discharges. Instead the Board ordered back pay only until the discharged employees were able to obtain substantially equivalent employment, and it allowed the petitioners to terminate back pay liability by placing the discharged employees on a preferential hiring list at other Deering Milliken mills. The Board also recognized that the petitioners might have a superseding, lawful reason for terminating or reducing back pay liability, such as showing that as of a particular date Darlington would have closed its mill or laid off employees even if they had not voted for the union. Provision is made in the Board's order for an opportunity to show mitigating circumstances at the compliance stage of the proceeding.

[13] Deering Milliken urges that the back pay award should be tolled because the examiner recommended dismissal of the complaint, and it was entitled to rely upon that decision until the Board reversed. For many years the Board followed the policy of tolling a back pay award when the trial examiner found in favor of the employer. The Board established its present practice of generally refusing to toll back pay in APW Products, Inc., 137 NLRB 25, 50 LRRM 1042 (1962), *enforced* National Labor Relations Board v. A. P. W. Products Co., 316 F.2d 899 (2d Cir. 1963). Its policy was restated and clarified in Farrell Hicks Chevrolet, Inc., 160 NLRB 134, 63 LRRM 1177 (1966). There the Board explained that an employer generally has no equitable standing for tolling an award when the unfair labor practice is based on a § 8(a) (3) complaint. In these cases the discharge

32. Cf. NLRB v. Brown, 380 U.S. 278, 286, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); Local 357, International Brotherhood of Teamsters etc., v. NLRB, 365 U.S. 667, 677, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961) (concurring opinion); Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB, 347 U.S. 17, 42, 74 S.Ct. 323, 98 L.Ed. 455 (1954).

33. Radio Officers Union, etc. v. NLRB, 347 U.S. 17, 50, 74 S.Ct. 323, 98 L.Ed. 455 (1954). Cf. NLRB v. Associated Naval Architects, Inc., 355 F.2d 788, 791 (4th Cir. 1966); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 105 (5th Cir. 1963).

34. Darlington Mfg. Co., 139 NLRB 241, 253, 51 LRRM 1278, 1284 (1962).

35. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 275, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965).

usually is prompted by an unlawful intent to discourage union activity, and the policy of the Act dictates that the resulting financial burdens should be placed upon the violator of the Act and not the employee against whom the discrimination has been directed. Only when the employer was not motivated by an unlawful intent does the Board now consider tolling. The Board's application of its rule to this case is not arbitrary or capricious, and we find no compelling reason for requiring it to revert to tolling practices discontinued many years ago.

[14] Deering Milliken also urges that the Supreme Court's tests of "interest" and "relationship" appear somewhat less exacting than the traditional single employer test and relate only to the standards for determining whether Darlington has violated the Act. These tests, Deering Milliken contends, are insufficient to impose vicarious remedial liability on Deering Milliken or on other corporations in its group. We do not agree. We find nothing in the Supreme Court's opinion to suggest that the single employer test should be more rigorous with respect to remedy than it is with regard to violation. The Court does not suggest the Act confers on employees a right without a remedy.

It is the Board which is charged with fashioning a remedy to effectuate the policies of the Act. "Within this limit the Board has wide discretion in ordering affirmative action * * *. The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' * * * [The Board's order] should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec. & P. Co. v. NLRB, 319 U.S. 533, 539, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943). [Brackets added.]

V.

[15] The Board also found that Darlington threatened the employees that the mill would be closed if the union won the election; told the employees after the election that the mill had been closed for this reason; supported a petition to disavow the union; and interrogated the employees with respect to their activities in behalf of the union. This conduct was held to violate § 8(a) (1) of the Act. These findings need no extended discussion. They are amply supported in the record. The Board also found a violation of § 8(a) (5) because Darlington refused to bargain; that the discharge of the employees constituted a violation of § 8(a) (1); and that Darlington violated § 8(a) (5) by refusing to bargain with respect to the tenure of employment of the Darlington employees and by refusing to furnish the Board with wage and related information. The validity of these findings is based upon the finding that the closing of the mill violated § 8(a) (3) and requires no further discussion.[36]

Enforcement granted.

HAYNSWORTH, Chief Judge (concurring):

I generally join the judgment of the court, but not without some misgivings springing principally from the conduct of the independent stockholders and directors.

I have no doubt that any executive in the position of Roger Milliken would not have approached the closure of Darlington, whether or not a union was in the picture, without careful thought to the effect of the closure upon employees of other mills under his general management. Anything less would have been managerial imprudence. In light of the proof of his purpose to avoid unionization elsewhere, therefore, I can readily accept the finding that he expected Darlington's closure so soon after the election

36. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 267 notes 5 and 6, 268 note 8, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965).

to serve the purpose of a dramatic warning to employees of other mills.

The difficulty in accepting the Board's other findings, for me, stems principally from the concurrence of Darlington's independent directors and stockholders, for they had no discernible interest in labor relations at other mills. Two of the directors were truly independent. One of them was a former treasurer of Darlington, but he was then retired and resident in the town of Darlington, while the other was a Darlington businessman without even a former history of employment by any Deering-Milliken related enterprise. Those directors, as directors, and they and other independent stockholders representing a third of the outstanding stock, were totally unconcerned with Milliken's present or prospective managerial problems in other mills. Their only interest was that of Darlington's stockholders, qua stockholders, except that those two directors and other stockholders resident in Darlington may have been influenced against the closure by its adverse impact upon other businesses in that small town. Their interest, therefore, indisputably was to oppose closure of the plant unless closure was dictated by the economic hopelessness of continued operation.

While Roger Milliken was the dominant individual in the management of all of the corporations, he had no power of control over the independent stockholders and directors on the question of plant closure. He could not ask them to sacrifice their financial interest for the sake of some anticipated advantage to Milliken elsewhere. Nor were they in a position of helplessness. If a purpose to chill unionization elsewhere was the procuring cause of the votes of the majority of the directors and of the Milliken stockholders, they committed a gross breach of their fiduciary duty to the minority stockholders, for which the courts provide injunctive and compensatory remedies. Armed with the weapons the minority had, there was no occasion for supine acquiescence; they had every incentive to fight for their own financial interest, and, if pointed toward continued operation of the mill, for the financial interests of their fellow townsmen.

If the independent, minority directors and stockholders, except those few dissenting stockholders, were convinced that subsequent operation of the mill was not in their economic interest, as they clearly were, it is difficult to ascribe a different controlling purpose to the majority. Closure of antiquated textile mills is far from unknown in the South as in the East, and everything in this record points to the conclusion that Darlington's days were numbered. The capital improvement program does not militate against the conclusion, for the capital expenditures were concentrated in movable machinery, not in brick and mortar or in such equipment as air conditioning, in which installation charges constitute a large proportion of the cost, and cost recovery is dependent upon subsequent successful operation. The expenditures were entirely consistent with last efforts to retrieve a dying venture and contain no suggestion of a willingness to reconstruct the building to one of modern efficiency or to incur all of those other costs which would have been necessary to convert the plant to other fabrics which might have been sold profitably. In short, on this score, the only open question on the record appears to have been not whether Darlington might have survived, but when its demise would have occurred.

On the question of timing, however, it seems to me there is a basis in the record for the Board's findings. No one contends that the relation in time between the election and the decision to suspend operations was fortuitous or coincidence. It may be, as Darlington contends, that the election result simply made a bleak prospect more dismal, but the record is not devoid of support for the inference that Roger Milliken was substantially motivated to move when he did with a purpose to salvage what advantage he could from a dramatic example to the employees of other plants. It is clear that the independent directors

would have made no such move at that time, for the subject of plant closure had not been discussed, and there is no showing that they had been shown the projections of the next year's losses. To the extent, therefore, that Roger Milliken was influenced by his interest in labor relations at other Milliken controlled mills and that his actions may be said to have been prompted by mixed motives, consistent with each other, the inference that his concern about other plants was not insubstantial is not so tenuous as to warrant our rejection. There is room for a difference of opinion as to whether, without a thought of the other plants, he would have moved when he did or waited for the next regularly scheduled directors' meeting. A leisurely approach to the avoidance of projected heavy losses is not to be expected but there is room in this record for the inference, drawn by the Board, that his action was more precipitate than it would have been had he been unconcerned about the employees of other plants.

The choice between permissible inferences, of course, is for the Board, not the Court, and, to the extent I have indicated, I think the inference the Board drew was a permissible one.

As the principle opinion notices, the duration of any back pay period has been left for determination in compliance proceedings, and there is no occasion for us to address ourselves to that matter, except that I would note that one cannot reconcile the emphatic evidence of the conduct of the independent directors and stockholders with any notion that Darlington had more than a very brief expectancy.

Finally, I would relieve Darlington of its joint obligation to discharge any back pay awards. It has liquid assets available for distribution to its stockholders subject to the payment of such awards. Equitably, a third of the fund belongs to the independent stockholders, who have committed no unfair labor practice. If an unfair labor practice was committed, as the Board found, it was committed by Roger Milliken and his associates for the supposed benefit and advantage of other Milliken enterprises, not in the least for the advantage of Darlington's stockholders. I think Deering-Milliken should alone shoulder the burden of payment of any back pay award.

ALBERT V. BRYAN, Circuit Judge (dissenting):

The Supreme Court's prefatory recount of the facts, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827 (1964), necessarily taken from the Board's findings, discloses a complete knowledge of all of the conduct and tie-ins which is now the predicate of the majority opinion. These premises the Supreme Court declared fell "short of establishing the factors of 'purpose' and 'effect' which are vital requisites of the general principles that govern a case of this kind." The controversy was remanded to the Board to make further findings.

Nothing significantly new was introduced *after* the remand. This is the observation of the trial examiner who heard the evidence on the return of the case to the Board. Indeed, this is manifest too in the majority's reliance now on what was said in dissent here, of course *before* the appeal. 325 F.2d 682, 689 (1963). My difficulty is understanding how our Court sees the facts as supporting "purpose and effect" where the Supreme Court could not.

A single director's, Roger Milliken, statements, writings and attitude are now imputed to the entire board of directors, and a majority of the stockholders, of Darlington by the Court to sustain the NLRB's finding that both the purpose and foreseeable effect of the plant closure was to "chill unionism" in the other Milliken plants. All of the power of Roger Milliken, and the entire linkage of Darlington with the other Milliken corporations, upon which the Court now counts, were known to the Supreme Court when it decided this case, and yet it did not think this evidence sufficient to arrive at the judgment now delivered by our majority.

The answer is that for its support the majority draws inferences and makes assumptions which are not warranted by the proof. With nothing to sustain it, the majority terms some of the Milliken units as "paper corporations". Also, it adopts a sweeping implication that their directors would do just exactly what Roger Milliken wished, for fear they be at once removed and replaced by him to register his views. This undeserved derogation of the directors stands refuted both by the absence of evidence to establish it, and by obstinate facts and testimony exactly opposite.

Darlington was closed for economic reasons according to its directors. At least they said so and gave the basis of their determination. The NLRB recognized this fact. In its supplemental decision it admitted that,

> "[a]ccording to the testimony in this case, the financial condition of Darlington was discussed at the board meeting. It was brought out that Darlington had averaged less than a 3 percent return on invested capital in the previous 5 years, including the current year in which a loss of $40,000 was expected, and that, if market prices did not rise or costs decrease, a loss of $240,000 could be anticipated in the following year."

There was no impeachment of the Darlington board's word save NLRB's argument, now accepted by the majority, that the members' votes were nothing more than echoes of Roger Milliken's partisanship. Truth is the directors were persons of conviction and *unquestioned* character. There were 7 including Roger Milliken, and 3 of them had no interest in any other Deering-Milliken corporations. The remaining 3 were connections of the Milliken family. The relationship alone does not impugn their evidence on the economic advisability of the plant closing.

The stockholders must also be found unworthy of belief, for they voted to ratify the directors' action. Additionally, the directors of Cotwool and Deering-Milliken must also be condemned in similar fashion. Each board voted, in favor of the closure, all of the Darlington shares held by its corporation, constituting a majority of Darlington's outstanding stock.

The NLRB's supplemental decision, upheld by the court, tells Darlington that it did not have a right to liquidate after the union election but instead should have made that decision prior to the election. With the financial losses that Darlington was currently sustaining, the corporation reasoned quite realistically that the foreseeable additional costs resulting from the arrival of the union, would be simply too much for the corporation to bear. Surely this consideration may be indulged, and acted upon, without offense to the National Labor Relations Act—indeed even if it be a mistaken conclusion.

The Trial Examiner emphasized that, "I find and conclude from all of the testimony * * * at this hearing, *confirmed* by that *previously* received, that a purpose at Darlington with respect to employees elsewhere has not been shown; and that testimony concerning related events at other mills is slight, considering quantity and credibility, and that such events can not be causally traced to a chilling purpose at Darlington." (Accent added.)

I think it appalling that the Board and the courts may step into a business and tell the directors that their judgment of the economics of their business was not correct, that it did not warrant the closing of their plant and that in reality they were evilly motivated in reference to union organization. More astounding, the Board presumes to know better than do the directors the basis for their decision—that they were simply paying servile obeisance to another.

I would not enforce the Board's order.

BOREMAN, Circuit Judge, authorizes me to state that he joins in this dissent.

BRUNSWICK CORPORATION, PLAINTIFF, AND FLOYD CORPORATION, D/B/A PLEASANT LANES, DEFENDANT

v.

J. C. LONG, ALBERTA S. LONG, AND THE BEACH CO., A CORPORATION, APPELLANTS

No. 11376.

United States Court of Appeals Fourth Circuit.

Argued Nov. 10, 1967.

Decided Feb. 2, 1968.

Certiorari Denied June 3, 1968.

See 88 S.Ct. 2036.

Action by chattel mortgagee to recover mortgaged property and money judgment for amount due on its accounts, in which landloard of chattel mortgagor intervened claiming a prior right to apply mortgaged property against amount due for balance of chattel mortgagor's lease and for actual and punitive damages on ground that chattel mortgagee had wrongfully invaded its priority by seizing mortgaged chattels. The United States District Court for the District of South Carolina, at Charleston, Robert W. Hemphill, J., entered judgment for chattel mortgageee for balance due, dismissed landlord's claims for damages, and determined that landlord had priority for rent payments actually in arrears but not as to rent for balance due on entire term of lease, and landlord appealed. The Court of Appeals, Winter, Circuit Judge, held that under South Carolina law, priority of landlord's claim for rent, payable in monthly installments, over claim of chattel mortgagee to mortgaged property placed on leased premises was limited to rent unpaid during period which lessee-chattel mortgagor had actually occupied premises and did not extend to total amount of rent due throughout entire term of ten-year lease.

Affirmed.

1. Chattel Mortgages ⇐6

Under South Carolina law, conditional sales contract is in legal effect chattel mortgage.

2. Landlord and Tenant ⇐248(1)

Under South Carolina law, court will preserve priority of landlord's claim when property is in custodia legis. Code S.C. 1962, § 41–205.

3. Landlord and Tenant ⇐248(1)

Court should exercise its power to protect landlord's priority to whatever extent it may have been asserted under process of restraint. Code S.C. 1962, § 41–205.

4. Chattel Mortgages ⇐150(2)

Although chattel mortgagee who obtains mortgage before chattels are placed upon leased premises but does not record it until after does not come within protection of South Carolina statute governing property distrained subject to chattel mortgage, he does have any additional priorty rights over landlord which general lien statutes grant to him. Code S.C. 1962, § 31–155.

5. Chattel Mortgages ⇐138(3)

Under South Carolina law, where chattel mortgage is not only not recorded but also not executed until after mortgaged property has been placed upon leased

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premises, landlord's right to distrain has priority over claim of chattel mortgagee regardless of whether landlord has notice, constructive or actual, of mortgage at time rent goes into arrears. Code S.C. 1962, §§ 41–155, 41–205.

6. Chattel Mortgages ⟸138(3)

Under South Carolina law, fact that chattel mortgagee's mortgages were not executed until after chattels were installed in building constructed by landlord did not defeat chattel mortgagee's rights after landlord's right to accrued and unpaid rent was satisfied. Code S.C. 1962, §§ 41–155, 41–205.

7. Chattel Mortgages ⟸138(3)

Priority of landlord's claim for rent, payable in monthly installments, over claim of chattel mortgagee to mortgaged property placed on leased premises was limited to rent unpaid during period which lessee-chattel mortgagor had actually occupied premises and did not extend to total amount of rent due throughout entire term of ten-year lease. Code S.C. 1962, §§ 41–155, 41–205.

8. Courts ⟸359

Function of federal court in applying state law is to attempt to decide case in same manner as would state courts.

9. Trespass ⟸19(1)

Under Couth Carolina law, landlord was not entitled to recover damages resulting from alleged intentional trespass upon its priority rights where in fact it possessed no such rights.

10. Chattel Mortgages ⟸ 172(1), 255

Under South Carolina law, chattel mortgagee by taking money judgment against chattel mortgagor did not forfeit its right to possession of chattels on which it held mortgages in view of fact that action brought by chattel mortgagee was not merely for claim and delivery and that in its complaint chattel mortgagee requested possession of chattels and money judgment against chattel mortgagor. Code S.C.1962, § 10–2516.

11. Replevin ⟸105, 106

South Carolina claim and delivery action affords restricted remedy to successful plaintiff, and he is entitled only to judgment for possession of chattel which he sought to recover or, if return of property is impossible, to money judgment for its value. Code S.C.1962, § 10–2516.

12. Chattel Mortgages ⟸172(1), 255

Both remedy of possessiou of chattels and money judgment against chattel mortgagor are available to chattel mortgagee. Code S.C. 1962, § 10–2516.

Charles S. Way, Jr., and Edward D. Buckley, Charleston, S.C. (Bailey & Buckley, Charleston, S.C., on brief), for appellants.

Augustine T. Smythe, Charleston, S.C. (Buist, Buist, Smythe & Smythe, Charleston, S.C., and Robert T. McNaney, Chicago, Ill., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and WOODROW W. JONES, District Judge.

WINTER, Circuit Judge:

The primary issue which we are called upon to decide in this case is the extent, under South Carolina law as applied to the particular lease agreement in question, of the priority of a landlord's claim to rent over the claim of a chattel mortgagee to mortgaged property placed upon the leased premises. *The district court ruled, against the contention of the landlord that it was entitled to recover the total amount of rent due throughout the term of the lease, that the landlord's claim had priority only to the extent that it was for rent unpaid during the period which tenant had actually occupied the premises.*[1] We affirm.

There is substantial agreement between the parties as to the facts.[2] Brunswick Corporation ("Brunswick") originally sold ten bowling lanes and pinsetters to one Raymond W. Floyd and his partner Swindal, taking a chattel mortgage on the property to secure the unpaid balance of the purchase price. When a default under this mortgage occurred Brunswick repossessed the lanes and pinsetters. Subse-

[1] If the landlord's contention were accepted, it would be entitled to $130,256.40; the district court awarded the landlord only $1,486.41.

[2] The parties disagree on whether Floyd Corporation represented to the landlord that the bowling equipment which was to be installed on the premises was free and clear of liens. However, we do not believe that resolution of this dispute is essential to the disposition of the case.

quently, Brunswick agreed to sell this equipment to Floyd for the balance due on the original mortgage. Floyd then organized the Floyd Corporation and entered into a ten-year lease, later assigned to The Beach Co. ("Beach"), which provided that the landlord would construct a building suitable for the installation of bowling alleys. The lease further provided that:

"Floyd agrees to pay Beach Co. for the origiual ten year term of tbis lease, a guaranted minimum rental of $128,557.20 *payable in advance* in One Hundred and Twenty (120) equal monthly installments of $1,071.31 on or before the 10th day of each month and every month during the ten year term hereof and the additional five year term if exercised by the tenant and at the same rate." (emphasis added)

The lease was excuted on February 22, 1962, and, in "short form," recorded on March 3, 1962.[3]

[1] In March, 1962, Brunswick executed a sales order with Floyd Corporation for certain miscelaneous equipment, and agreed to install the lanes and pinsetters in the building to be constructed by the landlord. After Beach had constructed the building in accordance with the terms of the lease, the bowling equipment was installed, and Floyd Corporation opened for business on September 15, 1962. It was not until October 24, 1962 that a conditional sales contract between Brunswick and Floyd Corporation was executed on the lanes and pinsetters. Although the conditional sales contract on tbe miscellaneous equipment was executed on August 17, 1962, Brunswick offered no proof before the district court to show that this document was executed before the equipment had been installed. Brunswick's conditional contracts of sale were recorded on August 20, 1962 and January 21, 1963, respectively.[4]

The bowling operation never seems to have been financially successful, and Floyd Corporation was unable to pay any substantial amount under the conditional sales contracts to Brunswick. On the other hand, it was able to make rental payments with some degree of regularity, and Beach took no legal action to enforce payment of the rent until January 22, 1965. On that date Beach distrained certain property of Floyd Corporation situated upon the leased premises—other than that subject to Brunswick's chattel mortgages—for the purpose of collecting rent payments of $2,086.41, then in arrears. This amount was reduced shortly thereafter by Floyd Corporation's partial payment of $600.00.

On February 3, 1965 Brunswick brought the present action against Floyd Corporation seeking a recovery of the mortgaged property—both that subject to the August 17, 1962 conditional sales contract and that subject to the October 24, 1962 conditional sales contract—and a money judgment for the amount due on its various accounts. Upon posting the statutory bond, Brunswick had the United States Marshal seize the mortgaged chattels. Beach intervened, claiming that it had a prior right to apply the mortgaged property against not only the amount of rent actually in arrears, but the entire sum due for the balance of the ten-year term. Beach also counter-claimed for actual and punitive damages totalling $50,000.00, alleging that Brunswick had intentionally and wrongfully invaded its priority rights by seizing the chattels.

Floyd Corporation did not appear in the proceedings, and the district court gave Brunswick judgment against it for the balances due under the conditional contracts of sale. The district court dismissed Beach's counterclaim; and as to the question of priority, found that although Beach had priority rights under the Statute of Anne, S.C.Code § 41-205, for the rent payments actually in arrears which had accumulated during the preceding year, it had no priority as to the rent for the balance of the ten-year term. From these rulings Beach appealed. In this Court it makes the further contention that Brunswick forfeited its right to possession of the mortgaged property by taking a money judgment against Floyd Corporation.

[2, 3] Beach relies strongly upon Leggett & Co. v. Orangeburg Piggly Wiggly Co., 176 S.C. 449, 180 S.E. 483 (1935), in support of its contention that it is entitled to recover the total amount of rents contracted for in the lease. Unlike

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[3] Brunswick has argued on appeal that the short form of the lease, being the only recorded document, did not give subsequent creditors notice of the terms of the full lease. This contention seems inconsistent with the statement of Brunswick's counsel before the district judge that "It is all one lease, except the short lease is just evidence of the long lease. That is what it amounts to." However, we do not need to reach the question whether Brunswick was given notice of the long lease by the recordation of the short lease, but may assume so arguendo.

[4] Under South Carolina law, a "conditional sales contract" is in legal effect a "chattel mortgage." Speizman v. Guill, 202 S.C. 498, 25 S.E.2d 731 (1943). In this opinion the terms are used interchangeably.

the landlord in *Piggly Wiggly*, Beach did not distrain upon the property which it seeks to make subject to its claim. However, under South Carolina law a court will preserve the priority of the landlord's claim when the property is in custodia legis. Ex parte Stackley, 161 S.C. 278, 159 S.E. 622 (1931); and although the priority protected in the *Stackley* case was only to the extent of one year's rent in accordance with the Statute of Anne, we believe that a court should exercise its power to protect the landlord's priority to whatever extent it may have been asserted under the process of distraint. Otherwise, a chattel mortgagee, who concededly had lost his priority over the landlord by his failure to record his mortgage, could regain this priority by the simple expedient of bringing a claim and delivery action before the landlord has distrained.

Thus, appellant's rights are to be measured by its right of distraint, as defined by South Carolina law, and we turn to a consideration of Leggett & Co. v. Orangeburg Piggly Wiggly Co., supra. In that case, after a lease—which provided that all the rent for the entire five-year term was due from the date of the lease—had been entered into and recorded, the premises were renovated and mortgaged property was placed thereon. The relevant mortgages were not recorded until approximately one month later. Almost two years thereafter, receivership ensued, at a time when there remained a substantial amount unpaid on the mortgage debt as well as on the rent, which the tenant had not paid during the latter part of the preceding year. On these facts the Supreme Court of South Carolina held that by virtue of the clause of the lease providing that all the rent was due at the beginning of the term, the landlord was a creditor of the tenant for that amount by the time the mortgages were recorded and the landlord had the right to distrain for such sum.

[4–7] One aspect of *Piggly Wiggly* which is different from the case at bar appears on its face to make that case all the stronger authority for Beach, the landlord herein: In *Piggly Wiggly* the chattel mortgages were at least executed, though not recorded, before the chattels were placed upon the leased premises. In some situations this distinction might well be of significance, as is indicated by the recent case of Frady v. Smith, 247 S.C. 353, 147 S.E.2d 412 (1966), in which it was held that the landlord's actual notice of a chattel mortgage which had been executed after the mortgaged property was placed upon the leased premises could not deprive the landlord of his right to distrain for unpaid rent which at least partially accrued after he had acquired notice of the mortgage.[5] However, Brunswick, unlike the mortgages in *Frady*, is not arguing that it possesses statutory priority which abrogates the landlord's right to distrain; rather, conceding Beach's priority, Brunswick contends that the landlord's right to distrain is limited to the rent which had already been earned by the tenant's actual occupation of the premises.[6] Thus, we regard the fact that Brunswick's mortgages were not executed until after the chattels were installed in the building constructed by Beach as not defeating Brunswick's rights after Beach's right to accrued and unpaid rent was satisfied.

In allowing Beach to recover only for the amount of rent which had actually been earned, the district court distinguished *Piggly Wiggly* on the ground that the lease involved here did not in fact provide that the total amount of the rent should be due at the beginning of the term. He reasoned that the term providing

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[5] Compare Mather-James Co. v. Wilson, 172 S.C. 387, 174 S.E. 265 (1934), in which the court said that where a chattel mortgage, although executed before the mortgaged chattels are placed upon the leased premises, is not recorded until after, the chattel mortgagee's claim is prior to the landlord's to the extent that a default in the rent payments did not occur until after recording of the mortgage. Similarly, in Haverty Furniture Co. v. Worthy, 241 S.C. 369, 128 S.E. 2d 707 (1962), it was held that a landlord's actual knowledge of a chattel mortgage which was not recorded until after the landlord had distrained the mortgaged chattel, but which was executed before the chattel was placed upon the leased premises, prevented the landlord from having priority over the chattel mortgagee in his claim for rent. Thus, it seems that although a chattel mortgagee who obtains a mortgage before the chattels are placed upon the leased premises, but does not record it until after, does not come within the protection of § 41–155 of the South Carolina Code, he does have any additional priority rights over the landlord which the general lien statutes grant to him. On the other hand, under the *Frady* case, it appears that where the chattel mortgage is not only not recorded, but also not executed until after the mortgaged property has been placed upon the leased premises, the landlord's right to distrain has priority over the claim of the chattel mortgagee regardless of whether the landlord has notice, constructive or actual, of the mortgage at the time the rent goes into arrears.

[6] In other words, as we understand Brunswick's position, it admits that the landlord would have a right to distrain for all rent which was due, whether it accrued before or after Brunswick's recording of its mortgages.

that the rent shall be "payable in advance in One Hundred and Twenty (120) equal monthly installments * * * on or before the 10th day of each month" meant only that each mouthly payment is payable in advance for each month. He cited several other clauses in the lease, such as that providing that Floyd Corporation "shall not be obligated for any payment of rental until such time as the sum of $3,000.00 [a credit given by the landlord for certain equipment supplied by Floyd Corporation] shall have been consumed" and auother providing that the same credit shall "be made by granting to Floyd a credit on the first rents coming due under the terms of this lease," to show that the parties had intended that the rent was to become due monthly. Moreover, he pointed out that Beach itself had acted consistently with this interpretation of the lease wheu on January 22, 1965 it distrained certain property of Floyd Corporation and claimed only those *monthly* rentals which were then in default.

[7] We find the reasoning of the district judge convincing and his conclusion sound. We agree that *Piggly Wiggly* does uot control. Indeed, our examination of the case law of South Carolina suggests strongly that either *Piggly Wiggly* has been overruled *sub silentio*, or that the Supreme Court of South Carolina would not apply its holding to the case at bar.

Five years after *Piggly Wiggly* was decided, the State Supreme Court was presented with a question which it phrased as whether "an acceleration clause [in a lease] * * * authorize[s] a landlord to distrain for rent which * * * [has] not been earned or accrued." Gentry v. Recreation, Inc., 192 S.C. 429, 7 S.E.2d 63, 128 A.L.R. 743 (1940). Without mentioning *Piggly Wiggly*, the court answered this question in the negative. It recited as factors influencing its decision: (1) the hesitancy of courts in many jurisdictions to hold such acceleration clauses valid for any purpose whatsoever since they are in the nature of a penalty; (2) the fact that such acceleration clauses were alien to the common law, from which the remedy of distraint emerged; (3) language from Fidelity Trust & Mortgage Co. v. Davis, 158 S.C. 400, 155 S.E. 622 (1930), which, significantly, before being revived in *Gentry* had been overruled by a line of cases culminating in *Piggly Wiggly*, that distraint is appropriate only "when the rent is in arrears;" and (4) then § 8822 of the South Carolina Code, which provided that if a tenant vacated the premises before his term had expired, the rent for the balance of the month in which the tenant left became immediately due and the landlord could distrain therefore.[7]

[8] *Without equivocation, the South Carolina Supreme Court concluded in Gentry that "we are definitely of the opinion that the lessors were not entitled to the remedy of distress for such unearned future rent."* 7 S.E.2d at 66. In light of this flat statement and the fact that the reasons given by the court for its decision are equally applicable to the lease provision purporting to make the total rent due at the beginning of the term as to one purporting to accelerate future rent in the event of default, we feel that if the South Carolina Supreme Court were now presented with the instant case, it would not distinguish *Gentry* on the grouud that *Gentry* concerned an acceleration clause and would hold that the landlord is entitled only to recover that rent which had been earned by the tenant's actual occupation of the premises.[8] We are aware that § 8822 of the 1932 South Carolina Code, upon which the court partially relied in *Gentry*, was repealed in 1946. However, the significance of the repeal is elusive. The repeal could mean either that parties are now free to include acceleration clauses, or their equivalent, in leases in order to broaden the landlord's right of distraint, or that a landlord has now been stripped of even the limited acceleration right which had previously been given him by statute and can distrain only for that amount which was actually due at the time the tenant vacated the premises. Because of the demonstrated tendency of the Supreme Court of South Carolina to

[7] The statutory section cited by the court was not necessarily support for the view that the legislature intended to restrict the landlord's right of distraint to recovery for only one month's rent in the event that the tenant vacated the premises. The court could have reasoned with equal logic that § 8822 did not prohibit the parties to a lease from providing for acceleration of rent for a greater term than one month, but only prescribed that in the absence of such agreement, acceleration of one month's rent would be effected as a matter of law.

[8] Appellee has also drawn our attention to the fact that the South Carolina Supreme Court has never once cited the Piggly Wiggly case in the more than thirty years since it was decided.

interpret relevant legislative action as limiting the landlord's distraint rights, see footnote 7, supra, it is probable that that Court would adopt the latter interpretation of the repeal.[9]

II

[9] Affirmance of the district court's dismissal of Beach's counterclaim necessarily follows from our resolution of the principal issue in the case. For it is clear that Beach is not entitled to recover damages resulting from an intentional trespass upon priority rights, if in fact it possessed no such rights. The cases cited by appellant are distinguishable on this ground. See, e.g., Webber v. Farmers Chevrolet Co., 186 S.C. 111, 195 S.E. 139 (1938); Bingham v. Harby, 91 S.C. 121, 74 S.E. 369 (1912).

Beach is, of course, entitled to recover all of the unpaid rent which had accrued up to the time of the seizure of the chattels under the Statute of Anne, S.C. Code § 41-205, since the period for which the rent was due did not exceed one year. But Brunswick was not interfered with this priority in any manner and has not even contested Beach's right to recover this amount.

III

[10-12] We also find no merit in Beach's contention that Brunswick forfeited its right to possession of the chattels on which it held mortgages by taking a money judgment against Floyd Corporation. It is true that the South Carolina claim and delivery action affords a restricted remedy to a successful plaintiff, i.e., he is entitled only to a judgment for possession of the chattel which he sought to recover, or, if return of the property is impossible, to a money judgment for its value. S.C. Code § 10-2516; Wilkins v. Willimon, 128 S.C. 509, 122 S.E. 503 (1924). But the action brought by Brunswick was not merely for claim and delivery. In its complaint Brunswick requested possession of the chattels *and* a money judgment against Floyd Corporation, both remedies being available to it as a mortgagee. Speizman v. Guill, 202 S.C. 498, 25 S.E.2d 731 (1943). It would be unreasonable to hold that by obtaining a money judgment against his debtor, a creditor cannot reach the principal asset available to enforce that judgment especially when a lien on this asset was bargained for as security for the extension of credit.

Beach seeks to distinguish the *Speizman* case on the ground that the plaintiff there foreclosed the mortgage without following the claim and delivery procedure and, therefore, was not able to gain possession of the mortgaged chattel before obtaining his judgment. We find this distinction unconvincing. In Stokes v. Liverpool & London & Globe Ins. Co., 130 S.C. 521, 126 S.E. 649 (1925), relied on by the Court in *Speizman*, it was pointed out that claim and delivery is one of several methods by which foreclosure can be accomplished, and no suggestion was made in that case that by choosing to follow this procedure a mortgagee is precluded from obtaining both a judgment on his mortgage debt and possession of the mortgaged chattel to satisfy that debt. Nor do we perceive any reason to achieve such a result. Protection against the abuse to which the immediate possession provision of the claim and delivery action is subject is provided by the requirement that the party invoking the procedure post bond or subject himself to the risk of punitive damages. S.C. Code § 10-2516. There is no necessity for the additional safeguard of forcing a mortgagee, who desires to avail himself of the claim and delivery action in order to foreclose a mortgage, to sacrifice remedies otherwise available to him. Accordingly, the district court committed no error in granting Brunswick the right to remove the chattels in accordance with its conditional sales contracts.

Affirmed.

[9] We also recognize that in *Gentry* since the lease in question was not recorded, the Court's statements concerning the inability of the acceleration clause to broaden the landlord's right of distraint was at most an alternative ground for the decision. Thus the Court said: "We are, therefore, of opinion from the record in this case that the respondent stands in the impregnable position of a wholly innocent third party, and hence would not be bound by the acceleration clause in the lease, even if it could be construed as conferring the right of distress." 7 S. E. 2d at 67.

That the portion of the *Gentry decision* upon which we rely is only an alternative holding, or even only dictum, does not persuade us that we should ignore it, however. Our function in applying state law under Erie R.R. Co. v. Tomkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), is to attempt to decide the case before us in the same manner as would the state courts. Clearly, we would not the state courts. Clearly, we would not be exercising this function if our approach was to restrict all of the state precedents to their own facts and to make nice distinctions between holdings and dicta, while failing to take into account all relevant indications of the state of the law of the state. Indeed, the fact that a state court has reached a question which it was not necessary for it to reach may be the surest guide as to how it would decide future cases raising similar issues.

John H. CUMMINGS, John L. Chisolm, Robert Johnson, Benjamin Wright, for themselves and all other persons similarly situated, Appellants,

v.

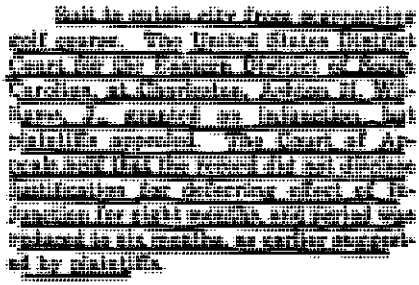
CITY OF CHARLESTON, a Municipal Corporation, The Charleston Municipal Golf Course Commission, Gerald M. Carter, Chairman, Alfred O. Halsey, Cornelious O. Thompson, T. Moultrie McKevlin, William A. Dotterer, Leroy Nelson and C. Dissel Jenkins, members of The Charleston Municipal Golf Course Commission; and John E. Adams, Manager of The Charleston Municipal Golf Course, Appellees.

No. 8281.

United States Court of Appeals Fourth Circuit.

Argued April 3, 1961.

Decided April 6, 1961.



Remanded with direction.

Injunction ⇐193

Record of action to enjoin city from segregating golf course did not disclose justification for deferring effect of injunction for eight months, and period was reduced to six months, as earlier suggested by plaintiffs.

Matthew J. Perry, Spartanburg, S. C. (Lincoln C. Jenkins, Jr., Columbia, S. C., Thurgood Marshall, Jack Greenberg, and James M. Nabrit, III, New York City, on brief), for appellants.

Henry B. Smythe, Charleston, S. C. (Morris D. Rosen, Charleston, S. C., on brief), for appellees.

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

PER CURIAM.

Appellants, negro citizens and residents of the City of Charleston, South Carolina, as plaintiffs in a class action instituted and prosecuted on behalf of themselves and others similarly situated, sought a permanent injunction restraining The City of Charleston and other named defendants, appellees, from denying access to the recreational facilities of a municipal golf course to any person for reasons of race or color. A full hearing of the controversy was held on September 7, 1960, and the decision granting the injunction was announced on November 26, 1960. However, the District Court concluded that it would be "equitable" to give the defendants a reasonable period of time for compliance and provided that the order granting injunctive relief should not be effective until eight months from and after the date of its entry. Appellants attack the "delay" of eight months as unreasonable, unsupported by any evidence demonstrating necessity and as a denial of the equal protection of laws secured to them by the Fourteenth Amendment to the Constitution of the United States.

We have searched the record and have found no evidence which would tend to explain the postponement of the effective date of the injunction order for what would seem to be an unreasonable period of time. We do not hold or even intimate that, if justifying circumstances were made to appear, the trial court could not exercise its sound discretion. But it is not apparent from the record that any real administrative or other problems are here involved such as are present in some of the school desegregation cases. Indeed, the record discloses nothing which would indicate that the injunction could not have been made immediately effective.

However, the unchallenged statement was made by counsel for the defendants at the bar of this court that plaintiffs' counsel tendered to the District Court a suggested form of final order which contained the provision that the injunction should not be operative until six months following the date of the entry of the order. Since more than four months have already elapsed following the entry of the final order, under the circumstances we believe that it would not be unfair or prejudicial to any of the parties involved to make the injunction effective six months from November 26, 1960, as originally proposed. It is so directed.

The case will be remanded to the District Court for modification of its order consistent with the views herein expressed.

Remanded with direction.

Warren H. WHEELER, an infant, and J. H. Wheeler, his father and next friend; et al., and C. C. Spaulding, III, an infant, and C. C. Spaulding, Jr., his father and next friend; et al., Appellants,

v.

DURHAM CITY BOARD OF EDUCATION, a body politic in Durham County, North Carolina, Appellee.

No. 8643.

United States Court of Appeals Fourth Circuit.

Reargued July 9, 1962.

Decided Oct. 12, 1962.

Negro pupils brought actions against city board of education for injunction against continued assignment of pupils to schools on basis of race and against imposing on Negro pupils seeking reassignment criteria not applied to white pupils seeking transfers. The United States District Court for the Middle District of North Carolina, at Durham, Edwin M. Stanley, Chief Judge, 196 F.Supp. 71, rendered a judgment adverse to the Negro pupils, and they appealed. The Court of Appeals, Sobeloff, Chief Judge, held that Negro pupils were entitled to an order for their admission to schools for which they had applied, to a declaratory judgment that board was administering the North Carolina Pupil Enrollment Act in an unconstitutional manner, and to an injunction against continuation of the board's discriminatory practices.

Reversed and remanded for further proceedings.

1. Constitutional Law ⇐220

Assignment of pupils to schools according to racial factors was unconstitutional administration of North Carolina Pupil Enrollment Act. G.S.N.C. § 115-176 et seq.

2. Declaratory Judgment ⇐210
Injunction ⇐78
Schools and School Districts ⇐155

Where board of education had assigned pupils to schools on basis of their race and had imposed on Negro pupils, who sought reassignment, criteria not applied to white pupils seeking transfers, Negro pupils were entitled to order for their admission to schools for which they had applied, to declaratory judgment that board of education was administering North Carolina Pupil Enrollment Act in unconstitutional manner, and to injunction against continuation of board's discriminatory practices. G.S.N.C. § 115-176 et seq.

3. Schools and School Districts ⇐13

Plan for ending racial discrimination in schools, before being approved by federal district court, should provide for immediate steps looking to termination of discriminatory practices with all deliberate speed in accordance with specified time table. G.S.N.C. § 115-176 et seq.

Jack Greenberg, New York City (James M. Nabrit, III, Derrick A. Bell, Conrad O. Pearson, M. Hugh Thompson, William A. Marsh, Jr., J. H. Wheeler, and F. B. McKissick, Durham, N. C., on the brief), for appellants.

Marshall T. Spears, Durham, N. C. (Spears & Spears, Durham, N. C., on the brief), for appellee.

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

SOBELOFF, Chief Judge.

This appeal is from the disposition made by the United States District Court for the Middle District of North Carolina of two cases consolidated into a single trial and record. The first, Wheeler v. Durham City Board of Education, was brought in April, 1960, by 163 Negro pupils, and their parents, protesting the maintenance of segregated schools in the city during the 1959–60 school year. The second, Spaulding v. Durham City Board of Education, was instituted in September, 1960, by 116 Negro school children, and their parents, including many of the same individuals who filed the Wheeler suit, similarly protesting the continued segregation of the schools during the 1960–61 school year.

The complaint in each case requested an injunction against the continued assignment of pupils to schools on the basis of their race and against imposing upon Negro pupils seeking reassignment criteria which were not applied to white pupils seeking transfers. Both complaints also prayed for orders "enjoining defendants * * * from assigning plaintiffs to any school other than the one to which they would be assigned if they were white" and supplied, in the body of the complaints, complete lists of all plaintiffs, the school to which each had been assigned, and the school to which each would have been assigned if he were a white child.

In a lengthy opinion handed down on July 20, 1961, the District Court found that some of the practices of the Durham board of education were discriminatory. However, the court denied relief to all individual plaintiffs who had not exhausted administrative remedies, and, as to the remaining plaintiffs, the court ordered the board to re-examine their applications for reassignment.[1] Of the 133 transfer applications so re-examined, the board denied all but eight. In its supplemental opinion of April 11, 1962, the District Court refused to grant any further relief and dismissed the complaints, solely on the ground that the plaintiffs "are still not seeking reassignment to any particular school," but "simply want nothing more or less than a general order of desegregation."[2]

Indisputably, the record shows that, for the 1959–60, 1960–61, and 1961–62 school years, the Durham board of education assigned first grade children to racially segregated schools in accordance with dual attendance area maps. All Negro first graders were assigned to one of the seven Negro elementary schools on the basis of the map which indicated the Negro schools serving the zones created by it. A separate map divided the city into geographic zones to determine the distribution of white children among the ten white elementary schools. Pupils graduating from elementary school were assigned to segregated junior high schools, also apparently on the basis of zones fixed by these maps. As for students entering senior high school, the dual attendance area maps were not needed as there were in the city only two high schools, one reserved for white pupils and the other for Negroes. However, the maps were used in the assignment of pupils entering the Durham school system for the first time after previously attending school elsewhere.

All other pupils were assigned to the same schools they had attended the preceding year. Thus, once a child was assigned to the first grade in a segregated

1. 196 F.Supp. 71 (M.D.N.C.1961).

2. 210 F.Supp. 839 (M.D.N.C.1962).

school pursuant to the dual attendance area maps, he would remain in that school. Upon his graduation from elementary school, the maps would place him in a segregated junior high school where he would continue until he was ready to complete his education in the segregated senior high school. Obviously, the practice of automatically reassigning pupils to the schools they attended the year before completed the plan, set in motion by the maps, for maintaining segregated schools. At the same time, it must be recognized that, once a Negro pupil successfully transferred to a white school, this practice also meant that he would continue in that school the following years.[3]

On this evidence, the District Court correctly held that resort to dual attendance area maps "offends the constitutional rights of the plaintiffs," [4] but ordered only that "the board shall report to the court * * * any action it has taken with reference to the future use of dual attendance area maps."

In direct response to the court's opinion, the board of education resolved, on July 27, 1961, "that the future use of dual attendance area maps be discontinued, effective immediately." The school superintendent was directed to make a study of the existing pattern of attendance at various schools and to recommend ways to establish new attendance areas. However, the board took no action to remedy the school assignments for the 1961–62 school year which had been made before the court's decision by use of the dual attendance area maps as outlined above. Moreover, the evidence shows that, despite the board's dutiful resolution, it has continued to utilize the dual attendance areas, if not the very maps themselves, to maintain segregated schools in the city.

Although the vast majority of children were assigned to schools for the 1961–62 year before both the District Court's opinion and the board's resolution, there were a number of pupils of both races who registered late and sought admission to the first grade after July 27. The following testimony of the superintendent of the Durham schools, taken in January, 1962, shows that these pupils were assigned to segregated schools in the same manner as if the dual attendance area maps had not been formally renounced:

"Q. And you use the same areas for all the first grade pupils entering this year? You use the same areas for these pupils assigned after July 27th that you used before, is that right?

"A. In most cases at least that would be true. [The superintendent explains that exceptions are necessarily made for crippled children.]

* * * * * *

"Q. Generally these late registrants, people who didn't go to preregistration and were assigned after July, were assigned, on the basis of the same zones?

"A. In general that would be true, because that again in general would be the place to which they normally could go to ask to be admitted."

These attendance areas, the superintendent went on to testify, were also used after the July 27 resolution to process the transfer applications submitted by reason of the pupil's change of residence.

The effectiveness of this system of initial assignments, coupled with the dis-

3. However, the testimony of the superintendent of schools disclosed an instance of two Negro pupils, reassigned at their request to a white junior high school in 1959, who moved their residence to the immediate neighborhood of the Negro junior high school the day before school opened. They were not permitted to report at the white school to which they had been assigned, but they were immediately assigned back to the Negro school because of their change of residence, despite the fact that the unvarying practice in such circumstances was for the pupils to take the initial step by applying for a transfer.

4. Marsh v. County School Board of Roanoke County, 305 F.2d 94 (4th Cir. 1962) Jones v. School Board of City of Alexandria, 278 F.2d 72, 76 (4th Cir. 1960).

criminatory transfer procedures, in maintaining racially segregated schools is graphically illustrated by the following figures gathered from the superintendent's testimony and from the records of the board of education. On October 31, 1961, there were 7,164 Negro pupils enrolled in the schools reserved for Negroes. No white pupil went to any of these schools. On the same day, there were 8,032 enrollees in the other schools in the system. Out of this group, only 15 were Negro. Six or seven Negroes were in the senior high school, six or seven in the junior high schools, and one in an elementary school. The rest of the children attending these schools were white.

[1] The uncontradicted evidence in this case is irreconcilable with the statement of the District Court in its supplemental opinion of April 11, 1962, that "the dual attendance area maps * * * have been eliminated." The court's own finding of fact, clearly correct, that "the defendant Board has not made any material change in its previous practice with respect to the initial assignments of first grade students * * *" further militates against the notion that the dual attendance areas have been eliminated. The inescapable conclusion from the evidence is that the assignment of pupils to the Durham public schools is based, in whole or in part, upon the race of those assigned. It is an unconstitutional administration of the North Carolina Pupil Enrollment Act to assign pupils to schools according to racial factors.[5]

[2, 3] This opinion could go on to discuss in detail the instances, abundantly appearing in the record, of unfairness and arbitrariness in the procedures imposed upon applicants for transfers to free themselves from the initial racial assignments. We find it unnecessary to burden the opinion with these details, for in Jeffers v. Whitley, 309 F.2d 621 decided today, we have declared the judicial relief that must be granted to school children who have been initially assigned on a racial basis. See also, Dillard v. School Board of City of Charlottesville, 308 F.2d 920. Here, it is sufficient to state only that, for the reasons given in Jeffers, these plaintiffs are entitled to an order for their admission for the 1962–63 school year to the schools for which they have applied, to a declaratory judgment that the defendants are administering the North Carolina Pupil Enrollment Act in an unconstitutional manner, and to an injunction against the continuance of the board's discriminatory practices. The injunction shall control all future assignment of pupils to schools unless and until the defendants submit to the District Court a suitable plan for ending the existing discrimination. "Any such plan, before being approved by the District Court, should provide for immediate steps looking to the termination of the discriminatory practices 'with all deliberate speed' in accordance with a specified time table." [6]

Reversed and remanded for further proceedings consistent with this opinion.

5. Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962); and see Marsh v. County School Board of Roanoke County, 305 F.2d 94 (4th Cir. 1962); Green v. School Board of City of Roanoke, 304 F.2d 118 (4th Cir. 1962); Dodson v. School Board of City of Charlottesville, 289 F.2d 439, 443 (4th Cir. 1961); Hill v. School Board of City of Norfolk, 282 F.2d 473, 475 (4th Cir. 1960); Jones v. School Board of City of Alexandria, 278 F.2d 72, 77 (4th Cir. 1960). For similar cases in other courts of appeals, see Northcross v. School Board of City of Memphis, 302 F.2d 818 (6th Cir. 1962); Norwood v. Tucker, 287 F.2d 798, 802–806, 809 (8th Cir. 1961); Manning v. Board of Public Instruction, 277 F.2d 370, 374–375 (5th Cir. 1960).

6. Green v. School Board of City of Roanoke, 304 F.2d 118 (4th Cir. 1962).

Warren H. WHEELER et al., and C. C. Spaulding, III, et al., Appellants,

v.

The DURHAM CITY BOARD OF EDUCATION, a body politic in Durham County, North Carolina, Appellee.

No. 9630.

United States Court of Appeals
Fourth Circuit.

Argued Jan. 12, 1965.

Decided June 1, 1965.

Consolidated actions involving desegregation of public schools. The United States District Court for the Middle District of North Carolina, at Durham, Edwin M. Stanley, Chief Judge, entered an order in part approving a desegregation plan submitted by the city board of education, and plaintiff pupils appealed. The Court of Appeals, Boreman, Circuit Judge, held that it was error to permit the board's plan to control pupil assignments beyond termination of present school term despite provision of transfer privilege, where proposed school zone boundaries, in part, were based on racial considerations.

Remanded for further proceedings.

1. Schools and School Districts ⇐154

Lower court erred in permitting plan of city board of education to control pupil assignments beyond termination of present school term despite provision of transfer privilege, where proposed school zone boundaries were in part based on racial considerations.

2. Schools and School Districts ⇐154

A freedom of choice system as to school attendance, to warrant approval, must operate to prevent discrimination and not merely to correct conditions which have been deliberately created by unlawfully discriminatory procedure.

3. Courts ⇐262.4(9)

Lower court did not abuse its discretion in refusing to enjoin city board of education's alleged practice of assigning teachers and other school personnel on racially segregated basis in absence of an effort to develop a record upon which finding of actual discrimination against pupils could be predicated and in absence of inquiry as to possible relation of teacher assignments to discrimination against pupils and as to impact of sought injunction on administration of schools.

4. Schools and School Districts ⇐155

In desegregation case the school construction program is appropriate matter for court consideration.

5. Schools and School Districts ⇐155

Where action involving desegregation of public schools had to be remanded for further proceedings in regard to pupil assignments, lower court was requested to make proper inquiry as to progress of school building and renovation program.

James M. Nabrit, III, New York City, (Jack Greenberg, Derrick A. Bell, Jr., New York City, Conrad O. Pearson, M. Hugh Thompson, William A. Marsh, Jr., F. B. McKissick and J. H. Wheeler, Durham, N. C., on brief) for appellants.

Jerry L. Jarvis and Marshall T. Spears, Durham, N. C. (Spears, Spears & Barnes, and Watkins & Jarvis, Durham, N. C., on brief) for appellee.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

BOREMAN, Circuit Judge.

For a third time these consolidated cases involving desegregation of the public schools of Durham, North Carolina, are here on appeal. The actions were begun in 1960. In July, 1961, the District Court found[1] that the Durham City

1. Wheeler v. Durham City Board of Education, 196 F.Supp. 71 (M.D.N.C.1961).

Board of Education (hereinafter "Board") operates a dual system of attendance areas based on race but refused to consider the case as a class action and entered no injunction, although directing the Board to reconsider the school placements of certain plaintiffs who were found to have exhausted all administrative remedies. Subsequently, in April, 1962, the District Court denied all relief and dismissed the case holding that the plaintiffs were not entitled to a general desegregation order for the school system.[2] Plaintiffs appealed and this court reversed.[3] This court condemned the continued use of dual attendance zones for initial assignments and the discriminatory procedures in connection with applications for transfer.

On remand, pursuant to this court's direction, the District Court entered an order on January 2, 1963, which required that the named plaintiffs be granted transfers as requested, enjoined certain discriminatory practices and provided that the order remain in effect until a satisfactory desegregation plan was presented and approved.

In April 1963, the Board proposed a desegregation plan to which the plaintiffs objected on numerous grounds. After a hearing, the lower court rejected the plan and ordered that the Board grant pupils free transfers, in September 1963, to desegregated schools upon request in grades one through nine. High school assignments remained as before during the 1963-64 term. The Board was directed to present a new plan for complete desegregation and the Board appealed but this court affirmed the District Court's order as "an appropriate interim decree." [4]

On or about April 28, 1964, the Board filed a new desegregation plan which contained lengthy and detailed provisions for pupil assignment. In summary, some of the basic features of the plan may be stated as follows:

(a) First grade pupils would be initially assigned in accord with an attendance area map adopted by the Board. By applying within fifteen days, these pupils might obtain transfers out of their attendance areas. Such transfers "shall be granted in the order received until the maximum capacity, per classroom shall be attained."

(b) Other elementary pupils would be assigned to the school they are now attending.

(c) Pupils assigned to elementary or junior high schools outside their attendance areas may request permission to attend the schools in their respective areas by applying for reassignment during a fifteen-day period. Requests shall be granted until capacity is reached.

(d) Pupils completing elementary school to be assigned to junior high school in accordance with a new attendance area map.

(e) Pupils completing junior high school to be assigned to high schools under a feeder system by which graduates of Brogden, Carr, and Holton will be assigned to Durham High School and graduates of Whitted and Shepard will be assigned to Hillside High School.

(f) Junior high school pupils would be assigned to the schools previously attended except that Whitted pupils living in the area of the new Shepard School would be assigned to Shepard.

(g) High school pupils are assigned to the school previously attended.

(h) Reassignment requests to be made within fifteen days after notification of initial assignment. Requests shall be granted in the order received and until class capacity is reached.

2. Wheeler v. Durham City Board of Education, 210 F.Supp. 839 (M.D.N.C.1962).

3. Wheeler v. Durham City Board of Education, 309 F.2d 630 (1962).

4. Wheeler v. Durham City Board of Education, 326 F.2d 759, 760.

Plaintiffs objected to the plan as inadequate and incomplete on several grounds among which were the following:

> The attendance area maps for initial assignments in elementary and junior high schools were drawn on a racial basis and were designed to segregate the races in the schools.
>
> The feeder system by which graduates of the all-Negro junior high schools are assigned to an all-Negro high school continues established segregation.

The District Court held a full evidentiary hearing on July 9, 1964. At the court's suggestion the parties filed proposed findings of fact and conclusions of law and presented oral arguments. On August 3, 1964, the court entered an order indicating disapproval of the Board's plan and stated, in part:

> "1. That the plan for desegregating the Durham City Schools, including the amendment thereto, is disapproved for the reason that the court is of the opinion that the school zone boundaries, with respect to elementary and junior high schools, in some instances have been drawn along racial residential lines, rather than along natural boundaries or the perimeters of compact areas surrounding the particular schools.
>
> "2. That the Durham City Board of Education has made substantial progress toward desegregating the Durham City School System which has resulted in the integration of the one formerly all-white high school, all three of the formerly all-white junior high schools, and nine of the eleven formerly all-white elementary schools. The plan submitted for the 1964–65 school year provides for a further desegregation of the school system by the rearrangement of school attendance zones.[5]
>
> "3. That with respect to the 1964–65 school year, all pupils in the Durham City School System shall be initially assigned in accordance with the plan submitted by the defendant [Board] on April 28, 1964, which plan is incorporated herein and made a part hereof by reference. Any pupil that has not already been assigned under that plan shall be assigned, and notice of the assignment given to the pupil and his parents or guardian, within five days from the date of this order."

The order further provided that not later than August 10, 1964, the Board should publish a notice in the daily Durham newspapers notifying the parents or guardians of all assigned pupils that the pupils have the absolute right, *except as otherwise provided*, to attend, during the 1964–65 school year, a school of their choice in the city system which teaches the grades to which the pupils have been assigned.

Thus, all pupils are to be initially assigned in accordance with the Board's plan; they are to be notified of their free choice to attend any school in the system but in the event of overcrowding the Board, with the approval of the court, can assign a child to the "next nearest predominantly white school" rather than to the school requested. The order is to remain in effect unless and until some other plan is presented to and approved by the court. If no other plan is presented and approved by the end of the 1964–65 school term, or by the end of a subsequent term, initial assignments are to again be made in accordance with the Board's plan and pupils shall have the same transfer rights as provided in the order.

From the testimony and the exhibits, it clearly appears that, in June 1964, there were several schools in the city system which were overcrowded, with an enrollment considerably in excess of capacity, while others were not filled to capacity. For example, the all-Negro Whitted Junior High then had an enroll-

5. The court did not point out the proposed rearrangement of particular attendance zones which would result in further desegregation.

ment of more than 300 beyond its normal capacity of 1,320 although it was proposed to alleviate this condition to some extent by assigning to the new Shepard Junior High [6] those pupils residing in the Shepard attendance area who had been enrolled in Whitted for the 1963-64 school year. The formerly all-white Durham High School, with a normal capacity of approximately 1,775, had an excess enrollment of approximately 26 and out of the total enrollment, only about 22 were Negroes. The Board proposed in its submitted plan that graduates of predominantly white Brogden, Carr, and Holton Junior High Schools should be assigned to Durham High School. The all-Negro Hillside High School had an enrollment of approximately 47 in excess of its normal capacity of 1,350. The plan provided that graduates of the predominantly Negro Whitted and Shepard Junior High Schools would be assigned to Hillside High. By this system Negro pupils in Negro junior high schools would be fed into the Negro high school and the overwhelming majority of the three predominantly white junior high schools would be fed into the high school where all the pupils were white except the relatively few Negroes who had been transferred there since the commencement of litigation. The plan further proposed that initial assignments would be made according to attendance area maps. The court determined that some school zone boundaries for elementary and junior high schools had been gerrymandered, that is, "in some instances [the boundaries] have been drawn along racial residence lines, rather than along natural boundaries or the perimeters of compact areas surrounding the particular school."

At the time of the last hearing below in this case, the Durham Public School System had about 15,400 pupils, including approximately 7,000 Negroes. During the 1963–64 school year, there were 19 elementary schools of which eight were all-Negro, two were all-white, and nine were predominantly white. There were four junior high schools, three of which were predominantly white, with comparatively few Negro pupils, and one was the all-Negro Whitted School hereinbefore mentioned. What further progress toward integration may have occurred as a result of the court's order of August 3, 1964, and the use of the transfer privilege is not disclosed by the record.

In its order of August 3, 1964, the court continued in effect an injunction which had issued on January 2, 1963, against the Board's discriminatory practices.[7] In the face of this restraining order, the Board had formulated and submitted its plan to continue initial and subsequent assignments of pupils and the feeder system which had been used in the past to produce and foster the continuation of the proscribed segregation and racial dis-

6. To be opened in September, 1964.

7. "It is further Ordered that the defendants, their agents, servants and employees are restrained and enjoined from any and all acts that regulate or affect the assignment of pupils to any public schools under their supervision, management or control on the basis of race or color. The defendants are specifically restrained and enjoined from (a) using any method of determining the placement of pupils in schools on the basis of racial consideration when pupils first enter the school system, when pupils are promoted from elementary school to junior high school, or from junior high school to high school, or when pupils change their residence from one part of the area served by the school system to another part of the school system's area; (b) using any separate racial attendance area maps or zones or their equivalent in determining the placement of pupils in schools; (c) from requiring any applicants for transfers to submit to any futile, burdensome, or discriminatory administrative procedures in order to obtain such transfers, including (but not limited to) the use of any criteria or standards for determining such requests which are not generally and uniformly used in assigning all pupils, and the requirement of administrative hearings or other procedures not uniformly applied in assigning pupils; and (d) using any standards relating to residence, academic achievement, overcrowding or otherwise in determining such transfer requests which are not used in determining initial assignment of all pupils."

crimination in the public schools. Possibly the Board reasoned that, by incorporating the proposed right of transfer provisions into the plan, it could escape or sidestep the restraints imposed by the January 1963 order. The District Court found that the proposed school zone boundaries had, in part, been gerrymandered and were based upon racial considerations. The continuation of initial assignments, the pattern of assignments into junior high schools, and the feeder system into the high schools would clearly be in violation of the court's order.

The time for commencement of the 1964–65 term was fast approaching when the court entered its order of August 3, 1964; the court was obligated to act without undue delay. The plan submitted by the Board as to pupil assignments was constitutionally unacceptable and could not be approved, as the court recognized. It appears from colloquies between court and counsel that the court was undertaking to follow the pronouncements of this court in Jeffers v. Whitley, 309 F.2d 621 (4 Cir. 1962). While the Board's plan made provision for a transfer privilege and the pupil's right to attend a school of his choice, the court, in final disposition, enlarged to some extent upon the proposal. For these efforts, to adopt legally acceptable procedures with respect to the 1964–65 school year, the court is to be commended since the apparent objective was to further desegregation of the schools and to eliminate racial discrimination in their operation.

This is not to say, however, that the August 3, 1964, order should or will be accorded full approval. To permit the Board's plan to operate as the basic method of determining initial assignments from gerrymandered zones and to control subsequent assignments, a legally indefensible plan which violates the lower court's order of January 2, 1963, in material respects, is contrary to this court's pronouncements concerning a permissible plan which, in operation, would afford complete freedom of choice, entirely free of any imposed racial considerations. Channeling pupils into schools by a method involving discriminatory practices and then requiring them, or even permitting them, to extricate themselves from situations thus illegally created, will not be approved.

In Jeffers v. Whitley, supra, this court placed the stamp of approval upon the right of free choice of schools to be exercised by parents and pupils at the time of initial pupil assignment and at reasonable intervals thereafter. In the more recent decision in Bradley v. School Board of City of Richmond, Virginia, 345 F.2d 310, which was handed down on April 7, 1965, the majority of this court held:

> "* * * A state or a school district offends no constitutional requirements when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend."

In Bradley the School Board had discontinued the use of long established dual attendance maps and zones in determining pupil assignments on a racial basis and the use of a racial feeder system which had been earlier condemned.[8] Instead, the schools were being operated under a system whereby each student was accorded the truly unrestricted freedom to attend the school of his choice. There was no problem with respect to overcrowding beyond the capacity of any school. This system was approved as meeting constitutional requirements. However, as was pointed out in Bradley,

> "* * * In this circuit, we do require the elimination of discrimination from initial assignments as a condition of approval of a free transfer plan."

[1, 2] We do not think that any statements appearing in the decisions of this

8. See Bradley v. School Board of the City of Richmond, Virginia, 317 F.2d 429 (4 Cir. 1963).

court in the Jeffers and Bradley cases would provide a basis for continuing in effect beyond the 1964–65 school term the Board's plan of pupil assignment in the City of Durham, even as enlarged by the court as to the pupil's right to transfer to a school other than the one to which he is assigned. If the Board so desires, it may abandon its objectionable plan and substitute in lieu thereof the unrestricted freedom of choice system as the Richmond School Board has done; or the Board may submit to the court some other assignment plan free of objections as to constitutionality but the present plan should be completely discarded and abandoned as a basis for determining initial and subsequent pupil assignments. The order of January 2, 1963, enjoining the use of racially discriminatory practices and procedures was reaffirmed and continued in effect by the order of August 3, 1964. The error here occurred when the District Court permitted the Board's plan to control discriminatory initial and subsequent assignments beyond the termination of the 1964–65 term. A freedom of choice system, to warrant approval, must operate to *prevent* discrimination and not merely to *correct* conditions which have been deliberately created by unlawfully discriminatory procedures.

[3] The plaintiffs complain that the court below erred in refusing to enjoin the Board's practice of assigning teachers and other school personnel on a racially segregated basis. It appears from the record that the court, while continuing its injunction against acts that regulate or affect the assignment of pupils, also required the school authorities to make a detailed study of the administrative and other problems involved with respect to the hiring and placement of teachers and other school personnel and to be prepared to express themselves fully concerning such problems at the end of the 1964–65 school year.

This same question as to the assignment of teachers on a racially segregated basis was raised and considered in Bradley v. School Board of Richmond, Virginia, supra. This court there held that the plaintiff pupils had "standing to raise such a question to the extent it involves an asserted denial of constitutionally protected rights of the pupils." This was simply an affirmation of this court's earlier holding in Griffin v. Board of Supervisors of Prince Edward County, Virginia, 339 F.2d 486, 493 (4 Cir. 1964). In Bradley, as in the case at bar, the plaintiffs had made no effort to develop a record upon which a finding of actual discrimination against pupils could be predicated and there had been no inquiry as to the possible relation, in fact or in law, of teacher assignments to discrimination against pupils, nor had there been any inquiry as to the impact of such an order as the plaintiffs sought upon the administration of the schools and upon the teachers and administrative personnel. The majority opinion in Bradley states:

> "When there has been no inquiry into the matter, it cannot be said that the plaintiffs have discharged the burden they must shoulder of showing that such assignments effect a denial of their constitutional rights.
>
> "Whether and when such an inquiry is to be had are matters with respect to which the District Court also has a large measure of discretion. * * *"

In the instant case, we find no abuse of the court's discretion in refusing the requested order. Obviously the question raised is still before the court for further relevant inquiry and consideration.

A bond issue has provided approximately $3,500,000 to be expended by the Board for construction of new school buildings on sites to be acquired and for the enlargement, repair, and renovation of existing facilities. The plaintiffs complain that the court denied their request for a specific injunction against the use of these funds in the construction and reconstruction program to perpetuate, maintain, or support segregation. Plaintiffs appear to argue that the court found that this matter of construction was not pertinent to the litigation.

[4] From remarks of the trial judge appearing in the record, we think he was fully aware of the possibility that a school construction program might be so directed as to perpetuate segregation. At the same time, he was reluctant to enter an order determining the location and size of new school facilities or what existing facilities should be enlarged. He clearly indicated his cognizance of the multitude of factors involved, such as the availability and cost of sites, the concentration of population, the present overcrowded conditions, etc. However, he was not unmindful of the responsibility of the Board in this area and he made known his conclusion that the burden would be on the Board to reasonably justify its actions and to demonstrate its good faith. Without specific or binding direction, the court expressed the hope that there would be some consultation between the parties to the litigation concerning the expansion program. The order last entered stated that the court had the assurance of the Board that its construction program would not be designed to perpetuate, maintain, or support segregation. It has been held that a school construction program is an appropriate matter for court consideration.[9] Conceivably the determination of the extent to which a busy court might or should undertake to formulate, direct, supervise, or police such a program would pose many problems. In view of the numerous factors involved in determining what, how, where and when new facilities are to be constructed or what old facilities may best be enlarged and renovated to meet pressing needs, the court's reluctance to issue a specific injunction is understandable, particularly since the Board was still subject to the provisions of the order of January 2, 1963, by which *any* and *all* acts that regulate or affect the assignment of pupils *on the basis of race or color* were enjoined.

We are advised that, as evidence of the Board's good faith, it held a special meeting in November, 1964, for the purpose of discussing capital needs, the use of the funds to be realized from the bond issue, and to consider its immediate and long-range programs for school location and construction. Plaintiffs' attorneys were invited to attend this meeting for the purpose of assisting the Board in its decisions and counsel for all parties met with the Board. Counsel for plaintiffs assured the Board that they would formulate their suggestions in the near future and present them before further action should become necessary with respect to these matters. Obviously the suggestion of the court as to consultation bore fruit, at least to that extent. As to what may have transpired since this appeal was submitted for decision, we have no knowledge.

[5] Since this case must be remanded for further proceedings, a proper inquiry should be made as to the progress of the building and renovation program. The court, in its discretion and in view of the history of this litigation, may require the Board to disclose in detail to the court and plaintiffs' counsel its tentative plans as they develop so that, if any issue develops, the court may resolve it before the Board has committed itself to a course of action by contract or otherwise from which it cannot withdraw without difficulty.

It will be distinctly understood that nothing we have said herein shall be construed or interpreted as expressing disapproval of neighborhood schools designed to serve a geographical area, so long as such schools are not used to create or foster racial discrimination and segregation. We are informed that there are no public transportation facilities in Durham and the Board furnishes no means of pupil transportation. The school children must walk or be driven to and from school by their parents. This is an added factor to be considered in selecting sites for new buildings and in enlarging old buildings which are overcrowded. In a recent decision, in Gilliam v. School Board

9. See Board of Public Instruction of Duval County, Fla. v. Braxton, 326 F.2d 616 (5 Cir. 1964).

of the City of Hopewell, Virginia, 345 F.2d 325, (4 Cir. April 7, 1965), this court said:

> "The Constitution does not require the abandonment of neighborhood schools and the transportation of pupils from one area to another solely for the purpose of mixing the races in the schools."

There it was found, however, that the area attendance zones were not gerrymandered or designed to impose a segregated school population. Certainly the Board here is under no obligation or requirement to abandon or discontinue the use of present school facilities. However, the potential effect of the proposed construction of new schools and the related program is a matter of concern and the District Court should take such action as, in its judgment, may be necessary to assure timely access to the courts.

The case will be remanded for further proceedings consistent with the views herein expressed.

Remanded for further proceedings.

Reginald A. HAWKINS, on behalf of himself and others similarly situated, Appellant,

v.

NORTH CAROLINA DENTAL SOCIETY, an unincorporated association, and its officers, W. B. Sherrod, President, L. Franklin Bumgardner, Vice-President, Luther Butler, President-elect, and S. B. Towler, Secretary-Treasurer, Second District Dental Society, Component of the North Carolina Dental Society, an unincorporated association and its officers, William F. Yelton, President, James A. Harrell, President-elect, Fleming H. Stone, Vice-President, O. J. Freund, Editor, and James E. Graham, Secretary-Treasurer, Appellees.

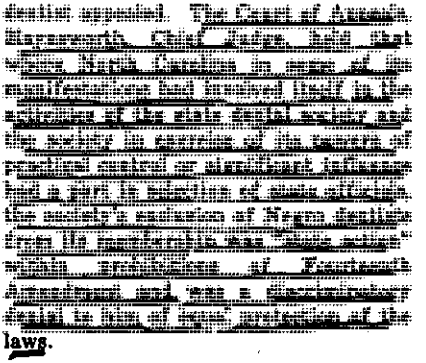
No. 9512.

United States Court of Appeals
Fourth Circuit.

Argued Jan. 12, 1965.

Decided Jan. 20, 1966.

Action by Negro dentist against state dental society on behalf of himself and others similarly situated. The United States District Court for the Western District of North Carolina, at Charlotte, Wilson Warlick, J., 230 F.Supp. 805, entered a judgment for the society and the



laws.

Reversed.

1. Constitutional Law ⇐215

Where North Carolina in some of its manifestations had involved itself in the

activities of the state dental society and the society in exercise of its powers of practical control or significant influence had a part in selection of state officials, society was a public function performed under general aegis of state so that its exclusion of Negro dentist from its membership was "state action" within prohibitions of Fourteenth Amendment and was a discriminatory denial to him of equal protection of the laws. U.S.C.A. Const. Amend. 14; G.S.N.C. §§ 90–22, 122–105, 131–117.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law ⇐215

Although statutory amendments, which were enacted subsequent to institution of action by Negro dentist to forbid state dental society from excluding Negro dentists, had changed the form in which society's powers were exercised, the exercise of those powers in altered form required conclusion that the statutory changes had not withdrawn the society's activities from the realm of state action within the prohibitions of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14; G.S.N.C. §§ 90–22, 122–105, 131–117.

3. Constitutional Law ⇐213

Although the line as to what constitutes state action within prohibition of Fourteenth Amendment is imprecise, when, as a practical matter, there is continued exercise of powers which are initially derived from and sanctioned by statutes and which touch so crucial an area as selection of state officials there is no doubt that exercise of such powers constitutes state action. U.S.C.A.Const. Amend. 14.

4. Constitutional Law ⇐215

The equal protection clause of the Fourteenth Amendment required that Negro dentist be not deprived, because of his race, of his equal right to participate as a member of state dental society whose members had a voice in the election and appointment of dentists to those offices of state which must be filled by dentists. U.S.C.A.Const. Amend. 14.

5. Constitutional Law ⇐215

Since membership in the appropriate regional dental society was a prerequisite to membership in the state dental society, the admission practices of regional societies were subject to the same constitutional standards as imposed on state society whose exclusion of Negroes from membership rolls was determined to be state action within prohibition of Fourteenth Amendment. U.S.C.A.Const. Amend. 14; G.S.N.C. §§ 90–22, 122–105, 131–117.

Jack Greenberg, New York City (Frank H. Heffron, New York City, and Thomas H. Wyche, Charlotte, N. C., on brief), for appellant.

William T. Joyner, Raleigh, N. C. (R. C. Howison, Jr., and Joyner & Howison, Raleigh, N. C., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN and BRYAN, Circuit Judges.

HAYNSWORTH, Chief Judge:

We conclude that the record requires findings that the North Carolina Dental Society's exclusion of this Negro dentist from its membership was state action within the prohibitions of the Fourteenth Amendment and that it was a discriminatory denial to him of the equal protection of the laws.

The plaintiff, a practicing dentist, licensed by the State of North Carolina, sought admission to the North Carolina Dental Society and its regional component, the Second District Dental Society, membership in the latter being a prerequisite to membership in the former. There is presently no Negro member of those societies, and the plaintiff was unable to obtain the recommendations of two white dentist members. Without such recommendations, his application was not even eligible for consideration. Feeling that his exclusion was a discrimination because of his race,

he then brought this class action for injunctive relief. We find that he was entitled to it.

The District Court grappled with the problem earnestly, but it did so in terms of the statutes as they appeared at the time of trial. Focus of attention there, however, deprives the statutes of the strong coloration which post-litigation history provides. The District Court was able to find, quite correctly, that, at the time of trial, in theory, any licensed dentist could be elected as a member of the Board of Dental Examiners or appointed by the Governor as the dental member of the Medical Care Commission or the Mental Health Council. Other activities of the Society in aid of the State's dental school and its research efforts, of adequate dental care in state mental hospitals and other institutions, and of appropriate fee schedules for dental services in State-sponsored programs were found to be "voluntary" and, of course, not state action. The District Court thus concluded that the Society's activities were private and not subject to the limitations of the Fourteenth Amendment.[1]

We think we should start at the beginning.

When the plaintiff sought admission to membership in the Society and when this action was begun, the statutes required that the six members of North Carolina's Board of Dental Examiners be elected by the Society.[2] Then, one member of the North Carolina Medical Care Commission was required to be the nominee of the Society,[3] while a representative of the Society had to be a member of the Mental Health Council.[4] There were also, the "voluntary" programs in aid of the state's dental school, hospital accreditation, dental care in state institutions and the promulgation of fee schedules for use by the state's industrial commission.

The Society had federal, as well as state, recognition, for the Veterans Administration required the Society's approval of applications by dentists to participate in the Administration's program.

When the Society declined consideration of the plaintiff's application for admission, therefore, and when this action was commenced, the state's statutes empowered the Society to name the six members of the North Carolina Board of Dental Examiners. They did much more. The dental member of the state's Medical Care Commission was required to be the nominee of the Society, and one member of the state's Mental Health Council was required to be a member of the Society. The other statutory recognition of the Society may be relegated to a back seat for the moment, for the ones upon which we now concentrate clearly authorized the Society to influence, if not to control, state functions.

The Board of Dental Examiners, the Medical Care Commission and the Mental Health Council are creatures of the State of North Carolina. The functions they serve are concededly public functions of the state. The questions at the time this action was commenced, therefore, were whether or not, the Society's exercise of its statutory powers to nominate and elect state officers [5] was state action, and, if so, whether or not its control of its membership, in the light of the additional requirement that another state officer [6] be a member of the Society, was also state action. The answers to these questions seem plain to us, but before we elaborate them we should refer to subsequent developments to put them in context.

After this controversy arose, § 90–22, N.C.Gen.Stat., was amended to delete the provision that the Dental Society name

1. Hawkins v. North Carolina Dental Society, W.D.N.C., 230 F.Supp. 805.
2. N.C.Gen.Stat. § 90–22 (1958).
3. N.C.Gen.Stat. § 131–117 (1958).
4. N.C.Gen.Stat. § 122–105 (1958).
5. The dental member of the Medical Care Commission and the Dental Examiners.
6. The dental member of Mental Health Council.

the members of the Board of Dental Examiners. Instead those members of the Board of Examiners who were not candidates to succeed themselves in that election were constituted a Board of Elections. Any licensed North Carolina dentist can now be nominated for election as a member of the Board of Examiners by a written petition signed by not less than ten licensed dentists and filed with the Board of Elections. The Board of Elections then prepares printed ballots containing the names of all nominees, one of which is mailed to each licensed dentist in the state, the eligible voters.

While the amendment of § 90–22 eliminated the role of the Society as such in the process of election of examiners and made it theoretically possible for a licensed, nonmember dentist to become a member of the Board of Examiners, there has been no substantial change in practical results. In the three elections held subsequent to the amendment there were three nominees for the two vacancies in the first one, but only two for the two vacancies in the second and third. In each of the latter two instances, the two nominees were declared elected without the formality of an election. All seven nominees in the three elections were members of the Society. At the time of the trial, all six Examiners were members of the Society, of course, and five of the six had been members of the Board prior to the amendment of § 90–22.[7]

In 1963, § 131–117 was amended to eliminate the provision that the dental member of the North Carolina Medical Care Commission was to be nominated by the Society. The amendment provided, instead, that the dental member of the Commission should be appointed by the Governor after requesting recommendations from the Society's president. At the same time, § 122–105 relating to the Mental Health Council was similarly amended. The amendments were sponsored by the Society.

At the oral argument in this Court, when reference was made to the fact that §§ 122–105 and 131–117, after the 1963 amendments, still contained explicit recognition of the Society's role in the nominating process, its attorney stated that if those provisions made the Society's conduct "state action," they could easily be eliminated when North Carolina's legislature met "next month." He was true to his word, and amendments were adopted deleting the requirements that the Governor solicit the recommendations of the Society's president when appointing the dental members of the Commission and the Council.

From the foregoing, it clearly appears that effective control of the practice of dentistry in North Carolina is in the Society. With respect to dentistry, the legislature leans heavily upon the Society. Its recommendations as to legislation are accepted, and embarrassing legislative recognition of its authority readily eliminated at its request. At the same time, while the statutes have undergone formal change at the Society's behest, there is no evidence of any change in its practical power to control the selection of the dental members of North Carolina's Boards, Commissions and Councils. The history of the three elections to the Board of Examiners following the amendment of § 90–22 demonstrates continuing control of the elective processes in the Society's inner clique.

The conclusion is inescapable that, when this action was begun, the Dental Society was performing important functions of the State. Exercise of its statutory powers to elect and nominate members of state boards and commissions was clearly state action. A similar conclusion has been reached with respect to a dental association whose powers were more in-

7. N.C.Gen.Stat. § 90–22, incidentally, is the section which contains the legislative declaration that the practice of dentistry affects the public health, safety and welfare and must be controlled and regulated in the public interest and restricted to qualified persons. Statutory provision for a Board of Examiners was the first step in the regulatory scheme and its primary purpose. The Board is clearly one of the state serving a public, regulatory function of the State.

direct.[8] An organization vested by statute with the power to control, or even to substantially influence, the selection of state officers functions as an arm of the state.[9]

Under the circumstances of this case, the subsequent watering down of the statutes cannot alter the result. What has happened here is closely in parallel to earlier attempts to divorce party primaries from the state for the purpose of avoiding barriers to the exclusion of Negroes. After the Supreme Court held that Negroes could not be excluded from participation in Democratic Party primaries in Texas,[10] the statute was amended to delegate to the executive committees of the parties the power to prescribe qualifications for participation in the primaries. Party exclusion of Negroes under the amended statute was held to be unconstitutional, for the delegation of the power to discriminate was the substantial equivalent of its earlier statutory requirement.[11] Thereafter, it was held that exclusion of Negroes from primaries by a resolution adopted by the Texas Democratic Convention, without statutory authority, was not impermissible,[12] but nine years later the Supreme Court reversed itself and overruled Grovey v. Townsend.[13] It was then that South Carolina tried the expedient of repealing all of its laws relating to primaries. That was held by this Court to be unavailing, and Democratic Party exclusion of Negroes from its primaries, then the only meaningful elections in that state, was declared unconstitutional.[14] Later the constitutional requirement was extended to racially exclusive clubs in which the Democratic Party had vested control of its primaries.[15]

The rule enunciated by this Court in Rice and Baskin was subsequently confirmed and extended by the Supreme Court.[16] There, the Jaybird Democratic Association, which, without statutory authority, held preliminary elections in Texas, which, in practice, determined the results of the ensuing Democratic Party primaries, was held subject to the constitutional prohibition of discrimination. Though the separation of the Jaybird Association from the state "could scarcely have been more complete," [17] its exercise of its practical power to control or influence the election of state officers, in light of the purpose and effect of its organization, was enough to bring its conduct within the constitutional requirements.

The post-litigation statutory changes procured by the Society in an effort to insulate its conduct can be held no less unsuccessful than the similar changes procured by the Democratic Parties of Texas and South Carolina for a similar purpose.

[1, 2] Here the Dental Society appears to be functioning clearly as the agent of the state in the selection of the dental members of the state's boards and commissions. Our conclusion is not dependent, however, upon a finding of fact to that effect. It is enough that North Carolina in some of its manifestations has involved itself in the Society's activities,[18] and that the Society's exercise

8. Bell v. Georgia Dental Ass'n, N.D.Ga., 231 F.Supp. 299; See also Wilson v. Thompson, 83 N.J.L. 57, 60, 83 A. 502, 504.

9. Nixon v. Herndon, 273 U.S. 536, 47 S. Ct. 446, 71 L.Ed. 759, and see its successors, cited below, coping with attempts at avoidance by indirection.

10. Nixon v. Herndon, 273 U.S. 536, 47 S. Ct. 446, 71 L.Ed. 759.

11. Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458.

12. Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680.

13. Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110.

14. Rice v. Elmore, 4 Cir., 165 F.2d 387.

15. Baskin v. Brown, 4 Cir., 174 F.2d 391.

16. Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152.

17. Lewis, The Meaning of State Action, 60 Colum.L.Rev. 1083, 1002.

18. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L. Ed.2d 45.

of its powers of practical control or significant influence in the selection of state officials is a public function performed under the general aegis of the state.[19] While the form in which the Society's powers are exercised has been changed, the continued existence of those powers and their exercise in their altered form requires the conclusion that the statutory changes have not withdrawn the Society's activities from the realm of state action.

[3] This is not to say that the activities of every organization which, because of the foresight of its leadership or the industry or identity of its members, influences public action are, themselves, state action. The line is necessarily imprecise,[20] and "[recognition of] the true boundaries between the individual and the community is the highest problem that thoughtful consideration of human society has to solve."[21] When, as a practical matter, however, there is continued exercise of powers initially derived from, and sanctioned by, statutes and touching so crucial an area as the selection of state officials, we entertain no doubt about the answer.[22]

[4] The activities of the Society being "state action", its practice of racial exclusivity is patently unconstitutional. Only as a member of the Society, can a professionally qualified, licensed dentist have a voice in the election and appointment of dentists to those offices of the state which must be filled by dentists. The equal protection clause of the Fourteenth Amendment requires that be be not deprived, because of his race, of that equal right to participate in the public affairs of the state.

[5] Since membership in the appropriate regional society is a prerequisite to membership in the state Society, the admission practices of the regional societies are subject to the same constitutional standards.

That the Dental Society in its admission practices has discriminated against Negroes is also clear. There were, at the time of the trial, 1,529 licensed dentists in North Carolina, of whom 90 to 100 were Negroes. There were 1,214 members of the Society, of whom not one was a Negro. Several Negro dentists had sought membership in the Society, none successfully.

The plaintiff, himself, is a graduate of the Howard University Dental School. He served a period of active duty as a commissioned dental officer in the Army. Licensed by North Carolina, of course, he has been a practicing dentist in that state for fifteen years. His application was not even considered, however, for he could not obtain the endorsements of two of the white members of the Society. Under the circumstances, when the Society's membership was racially exclusive and the recommendation of no Negro acceptable, rigid enforcement of the requirement of endorsements by members of the Society is itself a discrimination because of race. This has been the uniform conclusion of the courts in similar circumstances,[23] for, though use of such a rule in other contexts may be both reasonable and proper, applied to exclude Negroes, when no Negro, whatever his professional qualifications, can expect to

19. See, Simkins v. Moses H. Cone Memorial Hosp., 4 Cir., 323 F.2d 959, 966.

20. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45.

21. Freund, Individual and Commonwealth in the Thought of Mr. Justice Jackson, 8 Stan.L.Rev. 9 (1955), quoting Jellinek, The Declaration of the Rights of Man and of Citizens 08 (1901) (quoted in Lewis, The Meaning of State Action, 60 Colum. L.Rev. 1083, 1122).

22. Evans v. Newton, 86 S.Ct. 486 (decided January 17, 1966, since the preparation of this opinion) lends additional support to our conclusion.

23. Meridith v. Fair, 5 Cir., 298 F.2d 696; Hunt v. Arnold, N.D.Ga., 172 F.Supp. 847, 856. See also, United States v. Ward, W.D.La., 222 F.Supp. 617; United States v. Manning, W.D.La., 205 F.Supp. 172.

receive the endorsements of the white members, it is racially discriminatory.

For these reasons we conclude that the Society's activities have the character of state action and that its racially exclusive membership practices contravene the Fourteenth Amendment. Since the plaintiff was entitled to relief, the judgment below will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

Walter Raymond WANNER, an infant, by Raymond Wanner, father, and Frances S. Wanner, mother, and next friend, et al., Appellees,

v.

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA, Appellant.

No. 10208.

United States Court of Appeals
Fourth Circuit.

Argued Dec. 6, 1965.

Decided Feb. 7, 1966.

Action against county school board. From an order of the United States District Court for the Eastern District of Virginia at Alexandria, Oren R. Lewis, J., 245 F.Supp. 132, enjoining the board from putting desegregation plans into effect, the board appealed. The Court of Appeals, Sobeloff, Circuit Judge, held that the school board under injunctive orders prohibiting racial segregation was not prohibited from considering race in redrawing school attendance districts which had been racially gerrymandered and that there was no evidence to support complainants' contention that maintenance of newly created school district not as a single but as a dual building district, separating seventh grade pupils from eighth and ninth grade pupils, denied white children equal educational opportunities or impaired educational opportunities of district junior high school students.

Reversed.

1. Schools and School Districts ⇐154

School board under injunctive orders prohibiting racial segregation was not prohibited from considering race in redrawing school attendance districts which had been racially gerrymandered.

2. Schools and School Districts ⇐154

If a school board is constitutionally forbidden to institute system of racial segregation by use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted.

3. Constitutional Law ⇐220
Schools and School Districts ⇐13

Effort of school authorities to undo illegal racial segregational conditions is not to be frustrated on ground that race is not a permissible consideration; constitution does not discountenance such consideration of race. U.S.C.A.Const. Amend. 14; 5 U.S.C.A. §§ 2204, 2205; 28 U.S.C.A. § 1447; 42 U.S.C.A. §§ 1971, 1975a et seq., 2000a et seq.

4. Constitutional Law ⇐92

There is no legally protected vested interest in segregation.

5. Schools and School Districts ⇐154

Where school board is attempting in good faith to eliminate or reduce segregation, courts are not commissioned to enter into a debate with school authorities as to which redistricting plan among several is preferable from educational standpoint.

6. Schools and School Districts ⇐155

There was no evidence to support complainants' contention that in conjunction with desegregation plans, maintenance, of newly created school district not as a single but as a dual building district, separating seventh grade pupils from eighth and ninth grade pupils, denied white children equal educational opportunities or impaired educational opportunities of district junior high school students. U.S.C.A.Const. Amend. 14; 5 U.S.C.A. §§ 2204, 2205; 28 U.S.C.A. § 1447; 42 U.S.C.A. §§ 1971, 1975a et seq., 2000a et seq.

Edmund D. Campbell and Peter J. Kostik, Arlington, Va., for appellant.

LeRoy E. Batchelor, Arlington, Va. (Michael E. McKenzie, Arlington, Va., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN and BELL, Circuit Judges.

SOBELOFF, Circuit Judge:

For the fifth time the public school problems of Arlington County, Virginia,

are before this court. In the earlier chapters of this protracted litigation, Negro children were seeking decrees ordering the School Board to admit them to formerly white schools or other relief to advance the desegregation of the races in the county's school system. The novel feature of the present appeal is that when the Board acted, as it thought, to comply with earlier orders of this court as well as to improve the educational system of the county, it was, at the instance of white parents, enjoined by the District Court from putting its plans into effect.[1] From this injunction the Board now appeals.

The plan for the desegregation of the county's all-Negro Hoffman-Boston Junior High School, the District Court held, deprives the white plaintiffs of their rights under the Fourteenth Amendment and under the provisions of the Civil Rights Act of 1964. The District Court reasoned that the plan was the product of an "erroneous" belief on the part of the School Board that it was under a court order to close the all-Negro Hoffman-Boston Junior High School; that racial balance was the prime criterion used in redrawing the boundaries and that considerations based on race are constitutionally impermissible; and that there was no evidence to support the School Board's contention that the plan was educationally more desirable than the previous arrangement.

Before proceeding to the merits, it is important to recall that the School Board of Arlington County has since 1956 been under injunctive orders approved by this court, prohibiting racial segregation in the Arlington public schools.[2] In Brooks v. County School Board of Arlington County, 324 F.2d 303 (4th Cir. 1963), this court reversed an order of the District Court dissolving the injunction and ordered its reinstatement. Our opinion specifically noted the claims of the Negro plaintiffs that "the Hoffman-Boston district was originally created for Negroes when the maintenance of the segregated system was the avowed policy and practice" and that "Hoffman-Boston remains as it was contrived, a Negro enclave entirely surrounded by white school zones." This court further had occasion to declare that "[t]he District Court's finding that there is no evidence to sustain the charge that geographical boundaries were established to maintain segregation is clearly erroneous." 324 F.2d at 308.

While it is true, as the District Court has stated, that the *Brooks* decision did not place the School Board under a specific order to close Hoffman-Boston, the opinion made it perfectly clear that this court considered intolerable the continued maintenance of Hoffman-Boston as an

1. The School Board adopted its plan on March 25, 1965, after public hearings. Plaintiffs' complaint, filed April 12, 1965, sought both a preliminary and a permanent injunction to prevent the Board from implementing its plan. On April 21, 1965, the District Court held a hearing on the motion for a preliminary injunction and denied the motion. The merits were heard on May 19 and 21, 1965, but no opinion was rendered until August 6, 1965, and no final order was entered until August 23, 1965. The School Board petitioned this court for a stay of the injunctive order, and by assignment of the Chief Judge of the circuit, the writer of this opinion, after taking testimony and hearing argument on August 25, 1965, granted a stay pending appeal. The Arlington school system opened the 1965–1966 school year under the new plan.

2. *Sub nom.* School Board of City of Charlottesville v. Allen, 240 F.2d 59 (4th Cir. 1956), cert. denied, 353 U.S. 910, 77 S.Ct. 667, 1 L.Ed.2d 664 (1957), affirming Thompson v. County School Board of Arlington County, 144 F.Supp. 239 (E.D. Va.1956); Thompson v. County School Board of Arlington County, 252 F.2d 929 (4th Cir.), cert. denied, 356 U.S. 958, 78 S.Ct. 994, 2 L.Ed.2d 1065 (1958), affirming 159 F.Supp. 567 (E.D.Va.1957); Hamm v. County School Board of Arlington County, 263 F.2d 226 and 264 F.2d 945 (4th Cir. 1959), affirming in part and remanding in part Thompson v. County School Board of Arlington County, 166 F.Supp. 529 (E.D.Va.1958); Brooks v. County School Board of Arlington County, 324 F.2d 303 (4th Cir. 1963), reversing Thompson v. County School Board of Arlington County, 204 F.Supp. 620 (E. D.Va.1962).

all-Negro junior high school. Our opinion admonished the School Board that it had "the primary authority and responsibility to bring the school system into complete conformity with the law." 324 F.2d at 308.

Before proposing a new school districting plan, the School Board appointed a Criteria Committee, a panel of nineteen citizens, to render advice respecting school attendance areas. On February 11, 1965, it unanimously reported that

> "The present boundaries of the [Hoffman-Boston] district served by this all-Negro junior high school are completely artificial. The district is divided into two entirely separate subdivisions by the Army-Navy Country Club. The Gunston Junior High School district surrounds Hoffman-Boston on three sides."

With the findings of the Criteria Committee and the rulings of this court in mind, the School Board adopted a plan whereby three former junior high school districts (Hoffman-Boston, Thomas Jefferson, and Gunston) have been combined into two new districts (Jefferson and Gunston). The racial composition of each of the two new districts is approximately 75% white pupils and 25% Negro. When the School Board adopted its plan, it had knowledge of the racial imbalance in the student population of the districts involved and was aware that the new plan would result in reducing the imbalance.

The new Jefferson District operates its junior high school classes in two school buildings—the former Hoffman-Boston Junior High building, which houses seventh graders, and the former Thomas Jefferson Junior High building, which houses eighth and ninth graders.

The appellees do not contend, nor did the District Judge find, that the newly-created districts represent artificial boundary lines.[3] Rather, the plan is attacked on the grounds that the School Board "took race into consideration" in redrawing the boundary lines, and that the plaintiffs are denied equal educational opportunities because the newly-created Jefferson District will be maintained not as a single- but as a dual-building district, separating the seventh grade pupils from the eighth and ninth grade pupils.

I

[1] In ruling that the School Board in the existing circumstances is prohibited from considering race when redrawing school attendance districts, the District Court was clearly in error.

[2, 3] If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so instituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve "consideration of race." When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.

Here the Board, abandoning the racially gerrymandered lines of the past, adopted legally permissible geographic lines. This action was within the Board's lawful discretion. It is no ground of objection that other geographic lines might also have been drawn that would be less disruptive of the segregated pattern. An otherwise permissible redistricting plan does not become vulnerable because it attains a measure of racial balance.

[4] There is no legally protected vested interest in segregation. If there were,

3. Furthermore, the total amount of busing under the new arrangement is approximately the same as under the old.

then Brown v. Board of Education [4] and the numerous decisions based on that case would be pointless. Courts will not say in one breath that public school systems may not practice segregation, and in the next that they may do nothing to eliminate it.

The District Court and the plaintiffs place undue reliance on Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), cert. denied, 377 U.S. 924, 84 S.Ct. 1223, 12 L.Ed.2d 216 (1964). That case held that a federal court could not *compel* a school board to realign, in order to effectuate racial balance, school districts whose boundaries were innocently arrived at with no intent to maintain or perpetuate segregation.[5] Some courts have disagreed.[6] However this may be, in the case before us the record establishes beyond dispute that the Hoffman-Boston school district was the product of invidious racial discrimination.

No case was cited to this court, nor has one been found, which has *prohibited* a school board, when drawing or redrawing school attendance lines, from reducing or eliminating segregation, even where segregation was *de facto*, much less when brought about by a deliberate policy of separation of the races.[7] The Arlington County School Board has a more compelling case, for it was dealing not with *de facto* segregation but with the constitutionally forbidden practice of maintaining school attendance areas fixed with an eye to the separation of the races.[8]

Moreover, there is no basis whatsoever for the District Court's assertion that the School Board closed "an existing neighborhood school" in order to create racial balance. Neither Hoffman-Boston, nor Thomas Jefferson, nor Gunston was a truly "neighborhood" junior high school district. Because Thomas Jefferson and Gunston were contiguous to the Hoffman-Boston Negro enclave, the boundary lines of the former two were a creation of the racial gerrymandering of the Hoffman-Boston district and assumed the same artificial character as the Hoffman-Boston boundary lines. Certain white children in the old Gunston and Thomas Jefferson districts passed through sections of the Hoffman-Boston district in going to their respective schools. In drawing new and more natural boundary lines, the Board mitigated the effects of the per-

4. Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

5. That holding was followed in Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), cert. denied, 380 U.S. 914, 85 S.Ct. 898, 13 L.Ed.2d 800 (1965). Cf. Barksdale v. Springfield School Committee, 348 F.2d 261 (1st Cir. 1965), vacating 237 F.Supp. 543 (D. Mass.1965). Plaintiffs' citation of Gilliam v. School Board of City of Hopewell, Virginia, 345 F.2d 325 (4th Cir. 1965), is also misplaced. This court there held that the school board *could not be required* to abandon neighborhood schools and transport pupils from one area to another solely for the purpose of integrating the schools. The Supreme Court vacated the judgment in Gilliam on other grounds. 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (Nov. 15, 1965).

6. Blocker v. Board of Education of Manhasset, New York, 226 F.Supp. 208 (E.D.N.Y.1964); Branche v. Board of Education of Town of Hempstead, New York, 204 F.Supp. 150 (E.D.N.Y.1962); Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 31 Cal.Rptr. 606, 382 P.2d 878 (1963). See Judge J. Skelly Wright, "Public School Desegregation: Legal Remedies for De Facto Segregation," 40 N.Y.U.L.Rev. 285 (1965).

7. Cases in which courts have refused to enjoin a school board from implementing a plan designed to eliminate *de facto* segregation are Fuller v. Volk, 230 F.Supp. 25 (D.N.J.1964); Morean v. Board of Education of Town of Montclair, 42 N.J. 237, 200 A.2d 97 (1964); Addabbo v. Donovan, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965); Vetere v. Allen, 15 N.Y.2d 259, 258 N.Y.S.2d 77, 206 N.E.2d 174 (1965); Balaban v. Rubin, 14 N.Y.2d 193, 250 N.Y.S.2d 281, 199 N.E.2d 375, cert. denied, 379 U.S. 881, 85 S.Ct. 148, 13 L.Ed.2d 87 (1964). See Fiss, "Racial Imbalance in the Public Schools: The Constitutional Concepts," 78 Harv.L.Rev. 564, 574–583 (1965).

8. See Dowell v. School Board of Oklahoma City Public Schools, 244 F.Supp. 971 (W.D.Okl.1965).

sistent policy of segregation. In so doing, it has not exceeded its powers or violated its duty or the rights of the complainants.

II

[5] The District Court found that there is no evidence to support the School Board's determination that the plan affords the affected pupils educational opportunities greater than those available to them under the old system. It would be a dispositive answer to say that, where a school board is attempting in good faith to eliminate or reduce segregation, courts are not commissioned to enter into a debate with school authorities as to which redistricting plan among several is preferable from an educational standpoint.

[6] Moreover, we are of the view that the District Court's factual finding is clearly erroneous. There is no support in the record for the complainants' contention, accepted by the District Court, that the dual-building Jefferson District impairs the educational opportunities of the Jefferson Junior High School students. To the contrary, all the evidence is that the new arrangement, despite the dual-building feature, is educationally more advantageous.

The Criteria Committee advised the School Board that current thinking among educators is that junior high schools afford optimum educational opportunities when the size of the student body allows "two, three or more sections per elective subject * * * in order to provide adequate staffing and groupings according to the needs and abilities of all the children." The Committee reported that in Arlington the small junior high schools

> "have been recognized as less effective and less efficient because of such problems as too few children for adequate groupings, greater daily demands on teachers who must plan for more than one grade level or subject offering, and more difficulty in scheduling classes and in assigning special teachers and librarians to such schools on a full time basis."

The Committee's unanimous report supported the School Board's view that a junior high school provides optimum educational advantages when the student body ranges from 950 to 1200 pupils. The Hoffman-Boston school building has a capacity of 610, and the Thomas Jefferson building has a capacity of 725. Gunston's capacity is 1050.

After holding public hearings on March 11 and March 18, 1965, and considering the opinion of professional educators, the School Board rendered its final decision that the educational interests of the children involved would be best served by combining the three old districts into two new ones. In a letter to the parents, dated March 16, 1965, entitled "Information Relating to the New Junior High School District," School Superintendent Ray E. Reid pointed out that neither the Hoffman-Boston nor the Thomas Jefferson building was large enough to accommodate a student body of the desirable size; that by combining the two schools certain courses could be made available which were not formerly offered in either of these districts;[9] that "in some subjects, the larger size school makes it possible for grouping of students with similar abilities and similar learning problems."

In 1964, before the adoption of the School Board's plan, four of the county's

9. In a letter to the parents, dated March 16, 1965, and at the District Court hearing Superintendent Reid stated that the following courses were available at Gunston but not at Thomas Jefferson or Hoffman-Boston: French 2J, Spanish 2J, Latin I-9, Intermediate Strings, Personal Typing. The following courses were available at Gunston but not at Hoffman-Boston: Reading 9, Journalism, French I-S, Spanish I-J, Spanish I-E, Spanish 2-E, Geometry, Earth and Space Science, World History and Geography, Boys Chorus, Girls Chorus 8, Girls Chorus 9, Beginning Strings, Orchestra, Radio and Electronics. Superintendent Reid concluded that the size of the new Jefferson school should make these courses available.

seven junior high schools (Gunston, Kenmore, Stratford, and Williamsburg) were within, or very near to the optimum size of 950 to 1200 students. Of the remaining three (Hoffman-Boston, Thomas Jefferson, and Swanson) the plan brings two (Hoffman-Boston and Thomas Jefferson) within the Criteria Committee's recommendations and the Board's policy. The remaining district, Swanson, had an enrollment in 1964 of 732 students in a building with a capacity for 700. Thus, the effect of the adopted plan is that all but one of the junior high schools in Arlington County now conform to the minimum educational standards established by the School Board.

Superintendent Ray E. Reid testified that he would prefer that a new junior high school building be built to accommodate all the students in the newly formed Jefferson District, and that he was prepared to recommend a bond issue for this purpose to the voters of Arlington.[10] However, Mr. Reid went further, and testified that even if the bond issue were defeated by the voters, he would still recommend and support the enlarged Jefferson District with its dual-building arrangement as educationally more desirable than the former three-district system. The educational deficiencies under the old system, Mr. Reid added, were "significant," and the educational loss to the children from its continued use would be "irreparable."

Plaintiffs argue that if the Board in redistricting Hoffman-Boston, Thomas Jefferson, and Gunston were sincerely motivated in part by educational criteria, it would have rearranged the Swanson District also. The Swanson District, however, was not shown to be a product of racial segregation, and the compelling circumstances that led the Board to rearrange Hoffman-Boston and its contiguous districts did not obtain with respect to Swanson. If the Board had not been under a duty to realign the Hoffman-Boston, Thomas Jefferson, and Gunston Districts, perhaps it would not have moved at this time to change the pre-existing arrangement. But it *was* under a duty to rearrange the gerrymandered districts and did so in such a way as to achieve what it considered optimum educational advantages under all the circumstances. That the Board did not deem it feasible to go further and realign the Swanson District at this time does not cast doubt upon the testimony of the School Board members and the Superintendent that in their deliberate judgment the manner in which the gerrymandered districts were realigned is educationally advantageous.

The fact that the plaintiffs would have preferred a plan which retained the three-district system, concededly with rearranged boundary lines, provides no valid constitutional ground for upsetting the School Board's conclusion that the two-district system is educationally more desirable. There has been no showing that the School Board's plan has unconstitutionally deprived any of the plaintiffs of equal educational opportunities because of their race.

This record plainly shows that the School Board has not been arbitrary, that it has in fact proceeded fairly and with integrity. The District Court exceeded its authority when it undertook to override the School Board's action taken with the genuine purpose of complying with the law of the land and enhancing the county's educational system. The order of the District Court is

Reversed.

10. The bond issue was in fact proposed by the School Board on September 30, 1965, but was defeated by the voters on November 2, 1965. A bond issue for the expansion of the Swanson Junior High School was also proposed, and was approved by the voters.

Grace CHAMBERS, Doris Yvonne Greene, Mary Ann White and The North Carolina Teachers Association, a corporation, Appellants,

v.

The HENDERSONVILLE CITY BOARD OF EDUCATION, a public body corporate, Appellee.

No. 10379.

United States Court of Appeals
Fourth Circuit.

Argued May 2, 1966.

Decided June 6, 1966.

Action for injunctive relief alleging that individual plaintiff and other Negro teachers had been denied re-employment because of their race. The United States District Court for the Western District of North Carolina, J. Braxton Craven, Jr., Chief Judge, found for defendants, 245 F.Supp. 759, and appeal was taken. The Court of Appeals, J. Spencer Bell, Circuit Judge, held that Negro school teachers, as a class, were entitled to an order requiring school board, which decreased number of positions open to Negro teachers from 24 to 8, to set up definite objective standards for employment and retention of teachers and to apply them to all teachers alike in a manner compatible with requirements of due process and equal protection.

Reversed and remanded.

Bryan and Boreman, Circuit Judges, dissented.

1. Schools and School Districts ⇐141(5)

Sudden decrease in number of Negro teachers from 24 to 8 in city school system raised inference of discrimination which thrust upon school board the burden of justifying its conduct by clear and convincing evidence.

2. Constitutional Law ⇐238(1), 277(2)

Negro school teachers, as a class, were entitled to an order requiring school

board, which decreased number of positions open to Negro teachers from 24 to 8, to set up definite objective standards for employment and retention of teachers and to apply them to all teachers alike in a manner compatible with requirements of due process and equal protection. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

J. LeVonne Chambers, Charlotte, N. C. (Conrad O. Pearson, Durham, N. C., Ruben J. Dailey, Robert L. Harrell, Asheville, N. C., Jack Greenberg, Derrick A. Bell, Jr., and Melvyn Zarr, New York City, on brief) for appellants.

Hoyle B. Adams, Hendersonville, N. C. (L. B. Prince, Hendersonville, N. C., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN and J. SPENCER BELL, sitting en banc.

J. SPENCER BELL, Circuit Judge:

The plaintiffs, Negro school teachers and their professional association, brought this class action seeking an injunction against the racially discriminatory policies and practices of the School Board of the City of Hendersonville.[1] The district court dismissed their complaint and denied them injunctive relief. We reverse and remand.

Prior to the school year 1964–1965 the school system of Hendersonville consisted of three "white" and one consolidated Negro schools. In that year some pupil desegregation occurred on a freedom of choice basis as the result of litigation by the Negroes, but faculties remained rigidly segregated. There were approximately 81 white teachers employed at the three white schools and 24 Negro teachers at the consolidated Negro school. At the end of this school year the Negro enrollment dropped from 498 to 281 because 217 Negro students who had attended the consolidated Negro school from adjoining counties were by court order integrated into their respective county schools. For the school year 1965–1966, the Board abandoned its freedom of choice plan and integrated the remaining Negro pupils into the Hendersonville system on a single geographical zone basis. For this year the number of teacher jobs in the system was reduced by five. Of the twenty-four Negro teachers in the system only eight were offered re-employment for the year 1965–1966, although every white teacher who indicated the desire was re-employed together with 14 new white teachers, all of whom were without previous experience. In May of 1965, before he knew how many vacancies would exist for the next year, the superintendent advised the Negro teachers which ones would be retained. Acting on the assumption that their jobs had gone out of existence because of the withdrawal of the 217 Negro pupils, he recommended that the School Board retain only the number of seven Negro teachers which was the approximate "pro rata" allotment based upon the number of the remaining Negro pupils under the North Carolina teacher-pupil ratio. On cross-examination of the superintendent, the School Board's attorney brought out that he and the superintendent had discussed the problem and concluded that the Negro pupils should have "adequate representation at the teacher level." In its answer the School Board unequivocally disclosed its view of the matter by stating that the Negro teachers had "lost their jobs as a result of the social progress of integration."

In its opinion, the district court, after reciting the above facts, asked itself the question whether this "startling decimation of Negro teachers"—from 24 to 8—raises such an inference of racial discrimination as to place upon the defendants the burden of proof to the contrary. After concluding that no inference of

1. They rely upon 42 U.S.C. § 1983 and the Equal Protection and Due Process Clauses of the Constitution of the United States.

discrimination whatsoever is raised by these facts, the court adds that the plaintiffs' argument is reduced solely to the contention "that it is impossible that sixteen out of twenty-four Negro applicants (two-thirds) should be found inferior to white applicants with respect to qualifications for teaching." The court then proceeded to reject this argument as having no foundation in logic or law, and concluded that the plaintiffs had the burden of persuading it with respect to each individual teacher that he or she was not re-employed for discriminatory reasons. The court then reviewed the "reasons" offered by the superintendent for his failure to re-employ each of the Negro teachers and found that they were valid non-discriminatory reasons. We will not undertake to review the individual cases. It is clear from the record that the superintendent made all the decisions both as to the number and the identity of the Negro teachers to be re-employed. His acts were routinely ratified by the Board.

The school superintendent testified that he made the effective decision of all employment contracts; that he considered the principals' reports, but acted upon his own "personal preference" based upon the principals' reports, since he did not have the opportunity for firsthand observation. The report submitted by the principal of the Negro school was the only report submitted in writing. It was extremely elaborate and meticulous, listing, with respect to each teacher, such qualifications as: personality, philosophy, reputation, general appearance, physical defects, attitude, speech, optimism, love for children, age group in which interested, whether the principal wanted the teacher in his school, sense of humor, ability to discipline children, reaction of pupils and parents to teacher, and the principal's general appraisal of the teacher. On the other hand, the white principals' reports were oral, they could not remember details with respect to individual teachers, indeed one testified that he was not required to appraise his teachers but had done so voluntarily, and none testified that their reports attempted a comparative rating of their teachers. In short the Negro principal's report clearly reflected the knowledge that the number of Negro teachers was to be drastically reduced; consequently his teachers were graded comparatively while those of the white principals were used only to eliminate those teachers who, in the opinion of the principal or the superintendent, fell below a minimum standard. The informal oral reports made by the white principal furnished no basis whatsoever for any objective rating of their teachers either within each school or within the system or with new applicants. While the auperintendent contended that his decisions were not adversely influenced by the far more detailed and critical report of the Negro principal, he did not hesitate to use the adverse aspects of that report to justify his decisions in his testimony before the court. Thus he employed some Negroes because of a favorable recommendation by the principal but refused to employ others who had received equally favorable recommendations. Low N.T.E. scores were offered to justify failure to hire some teachers with years of experience although many teachers, both white and Negro, had never been required to take the tests. Seniority was of no help. In the case of one teacher with 39 years experience, her age was cited as a reason for refusal to hire, notwithstanding the fact that 9 white teachers with from 35 to 41 years of experience were retained. In a number of cases the Negro teacher's qualifications were compared unfavorably in one aspect or another with those of a new teacher who was hired to fill the vacancy, although no white teacher who desired to remain was required to pass this test. Thus, in the case of one Negro teacher the defendants made no attempt to show that she was other than a very good and competent teacher; the record evidenced no objective reason to support the failure to re-employ her, but the superintendent had

simply concluded that three other teachers were better. Nevertheless the court, reviewing the above facts and conceding that his judgment would have been different, refused to substitute his judgment for the professional judgment of the superintendent. Reiterating that the burden was on the plaintiffs to prove that the defendants had acted discriminatorily and in bad faith, the court concluded that they had failed to carry this burden and dismissed the case.

Patent upon the face of this record is the erroneous premise that when the 217 Negro pupils departed and the all Negro consolidated school was abolished, the Negro teachers lost their jobs and that they, therefore, stood in the position of new applicants. The Board's conduct involved four errors of law. First, the mandate of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), forbids the consideration of race in faculty selection just as it forbids it in pupil placement. See Wheeler v. Durham City Board of Education, 346 F.2d 768, 773 (4 Cir. 1965). Thus the reduction in the number of Negro pupils did not justify a corresponding reduction in the number of Negro teachers. Franklin v. County School Board of Giles County, 360 F.2d 325 (4 Cir. 1966). Second, the Negro school teachers were public employees who could not be discriminated against on account of their race with respect to their retention in the system. Johnson v. Branch, 364 F.2d 177 (4 Cir. 1966), and cases therein cited, wherein the court discussed the North Carolina law respecting teacher contracts and the right of renewal. White teachers who met the minimum standards and desired to retain their jobs were not required to stand comparison with new applicants or with other teachers in the system. Consequently the Negro teachers who desired to remain should not have been put to such a test. In Franklin v. County School Board of Giles County, 242 F.Supp. 871 (W.D.Va. 1965), reversed as to remedy, 360 F.2d 325 (4 Cir. 1966), which involved the closing of a Negro school and the subsequent failure to re-employ the Negro teachers under circumstances very similar to this case, the court said:

> "In view of the pre-existing policy, [a policy of treating all the teachers in the school district as a homogeneous faculty so that when a school was closed, its teachers were retained on an equal basis with all the other teachers in the system.] I believe that the Superintendent's stated policy with regard to these plaintiffs, i. e., to evaluate their right to continued employment in terms of the *vacancies* then existing in the other schools in the system rather than by comparison of their effectiveness with the other teachers in the system was too restrictive and its use in this particular instance resulted in a discrimination against these individuals." (Emphasis in original.) At 374.

[1] Finally, the test itself was too subjective[2] to withstand scrutiny in the face of the long history of racial discrimination in the community and the failure of the public school system to desegregate in compliance with the mandate of *Brown* until forced to do so by litigation. In this background, the sudden disproportionate decimation in the ranks of the Negro teachers did raise an inference of discrimination which thrust upon the School Board the burden of justifying its conduct by clear and convincing evidence. Innumerable cases have clearly established the principle that under circumstances such as this where a history of racial discrimination exists, the burden of proof has been thrown upon the party having the power to produce the facts. In the field of jury discrimination see: Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958).; Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955);

2. As principal of one of the white schools put it: "It's like picking a wife, I might find her attractive, you may not." The superintendent gave as justification for his failure to employ several of the plaintiffs—"personal preference."

Avery v. State of Georgia, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1953); Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964). The defendants' reliance on Brooks v. School District of City of Moberly, Missouri, 267 F.2d 733 (8 Cir. 1959), is not well founded. In that case the School Board had promptly proceeded to desegregate following the *Brown* case. Furthermore, the facts showed that the School Board, prior to the end of the school year, carefully compared the qualifications of *all* the teachers, using previously established uniform standards. The procedure resulted in the failure to rehire both white and Negro teachers.

[2] The plaintiffs as a class are entitled to an order requiring the Board to set up definite objective standards for the employment and retention of teachers and to apply them to all teachers alike in a manner compatible with the requirements of the Due Process and Equal Protection Clauses of the Constitution. All of the plaintiffs who desire to teach in the Hendersonville School system and who can meet the minimum standards of the Board are entitled to an order requiring their re-employment for the 1966–1967 school year[3] and an award of any damages which may have been incurred. Franklin v. County School Board of Giles County, 360 F.2d 325 (4 Cir. 1966). The order of the court should require that these steps be taken under its supervision until the transition to a desegregated faculty is completed.

Reversed and remanded.

ALBERT V. BRYAN, Circuit Judge (dissenting):

The legal principles stated in the majority opinion may be accepted without agreement with its conclusion. The District Court evinced complete awareness of them, and entire adherence, I think. Casting upon the school authorities the burden to exonerate themselves of the imputation of racial discrimination, the Court scrupulously examined the circumstances in the case of each Negro teacher who was not re-hired. This was not merely a general survey but, rather, a careful and conscientious canvass of the reasons in each individual instance for not retaining the teacher. The majority opinion, however, sweepingly applies general principles to all released teachers and concludes, erroneously it seems to me, they were all denied their Constitutional rights.

For example, of the 16 Negro teachers not reemployed, 6 were not kept for personal or wholly objective reasons. One desired to retire; another did not wish to teach in an integrated school and declined to be considered for reemployment; another taught bricklaying only, and this class had been abolished for lack of students; another was refused because of objectionable personal habits, the nature of which the School Board was willing to reveal, but as plaintiffs' counsel could not express his consent to the admission of this testimony, the Court declined to receive it for fear of embarrassing him; still another was 56 years old, 5 feet 5½ inches in height and weighed 219 pounds, and her physical condition was considered disabling; and the 6th was not retained for medical reasons, on the statement of her personal physician, then also a member of the School Board.

3. While all of the improperly discharged teachers are entitled to re-employment, we do not think any practical benefit would be derived by requiring the Board to offer re-employment to a teacher who failed to meet definite, objective minimum standards. Especially is this true since the teachers are all presently employed and consequently could not accept the jobs until the next school year. In the interim, it is to be expected that the Board will have adopted with the court's approval satisfactory regulations and will have applied such standards in the process of renewing all of its faculty contracts for the coming year.

The remaining 10 included 5 who "by objective standards, simply do not meet the *minimum* qualifications for employment in the reorganized school system". This same measure was applied to all teachers without reference to race.

This leaves 5 Negro teachers not continued in the schools. The record of every one of them was scrutinized by the District Judge, who made this finding:

> "By way of summary, four out of these five teachers were rated by their own Negro principal to be average or below average teachers. The evidence shows that all of the employed competing white teachers were appraised by their respective principals or by the Superintendent as being much better than average. The School Board and the Superintendent have satisfactorily explained, almost beyond argument it seems to me, their failure to employ at least fifteen out of the sixteen members of the class. Mrs. Loree G. Jackson is apparently an excellent teacher. If it were my responsibility to weigh her qualifications against those of the competing teachers, I might consider her to be as well, or even better, qualified than they. But that responsibility is not mine."

Whatever Constitutional guidelines are recognized, the bald facts here plainly reveal that at least 15 of the 16 unretained teachers were not kept because of their own preference, their physical incapacity or their failure to meet minimum criteria. This is hardly a record of a racial judgment. General principles do not supplant realities; the Constitutional fundamentals stressed by the majority are here abstract and academic.

As the findings of the District Judge, upon his plenary re-examination of the school authorities' decisions, cannot be declared clearly erroneous, his decree should be affirmed.

I am authorized by Judge BOREMAN to state that he joins in this dissent.

Warren H. WHEELER, et al., and C. C. Spaulding, III, et al., Appellants,

v.

The DURHAM CITY BOARD OF EDUCATION, a body politic in Durham County, North Carolina, Appellee.

No. 10460.

United States Court of Appeals
Fourth Circuit.

Argued May 30, 1966.

Decided July 5, 1966.

School desegregation case. The United States District Court for the Middle District of North Carolina, at Durham, Edwin M. Stanley, Chief District Judge, 249 F.Supp. 145, declined to order employment and assignment of teachers in school system without regard to race, and an appeal was taken. The Court of Appeals, Albert V. Bryan, Circuit Judge, held that removal of race consideration from faculty selection and allocation is, as a matter of law, inseparable from, and indispensable to abolition of pupil segregation in public schools.

Affirmed in part, reversed in part and remanded.

See also, 4 Cir., 346 F.2d 768.

1. Schools and Schools Districts ⇐141(1)

Pupils and parents have standing to question faculty assignments, and absence of any teachers as parties, actual or represented, did not deprive court of jurisdiction to require employment and assignment of teachers in city school system without regard to race.

2. Schools and School Districts ⇐141(1)

Removal of race consideration from faculty selection and allocation is, as a matter of law, inseparable from, and indispensable to, abolition of pupil segregation in public schools; and no proof of relationship between faculty allocation and pupil assignment was required of plaintiffs seeking to require employment and assignment of teachers without regard to race.

3. Schools and School Districts ⇐133

Evidence established that race was factor entering into employment and placement of teachers.

4. Schools and School Districts ⇐133

Findings established actual use of race as determinant in faculty allocations.

5. Schools and School Districts ⇐141(1)

In absence of teachers as parties to litigation in which plaintiffs sought to require employment and assignment of teachers in city school system without regard to race, order should not require any involuntary assignment or reassignment of teacher, but it would be necessary to require that vacant teacher positions in future be open to all applicants and that transfers by present members of faculty to schools in which pupils were wholly or predominantly of race other than that of teacher should be encouraged.

James M. Nabrit, III, New York City (Jack Greenberg, Derrick A. Bell, Jr., New York City, Conrad O. Pearson, M. Hugh Thompson, William A. Marsh, Jr., F. B. McKissick, J. H. Wheeler, Durham, N. C., and J. LeVonne Chambers, Charlotte, N. C., on brief), for appellants.

Jerry L. Jarvis and Marshall T. Spears, Durham, N. C. (Spears, Spears & Barnes, and Watkins & Jarvis, Durham, N. C., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN and BELL, Circuit Judges, sitting en banc.

ALBERT V. BRYAN, Circuit Judge:

Further racial desegregation of the public schools in the City of Durham, North Carolina is sought by the appellants, Negro pupils and parents. Since 1960 they have continually pressed for rights and privileges assertedly accorded them by Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). The history of the Durham litigation and the school board's plans for the non-racial assignment of pupils were precisely recounted and expounded by Judge Boreman for this court in Wheeler v. Durham City Board of Education, 346 F.2d 768 (1965), in which we disapproved the plan then under consideration. Not resolved there, on remand the present demand—assignment of teachers and other school personnel without reference to race—was pursued and is the subject of this appeal.

On July 16, 1965, promptly after our *Wheeler* decision, the District Court entered a consent order governing pupil assignment for the 1965–1966 session only. A week later the hearing on remand was set for September 23, 1965. The Court then also directed that the school board by September 9, 1965 submit a report of its proposals for faculty assignment.

The past teacher-policy of the Board and the latter's report of its future intentions, as filed on September 13, 1965, were summarized by the Court as follows:

"15. While the defendant Board has no policy *requiring* the employment of Negro teachers to teach at all Negro schools, or the employment of white teachers to teach at all white or predominantly white schools, the *admitted practice* of the Board has been to employ the best qualified available Negro teachers for schools attended by Negro

pupils, and the best qualified white teachers for schools attended solely or predominantly by white pupils.

"16. On August 30, 1965, by a 4–2 vote, the defendant Board voted to continue its existing policy with respect to teacher assignments, but stated that it might, by majority vote, 'make exceptions to any of its policies for valid and sound educational reasons.' The Superintendent understands this policy to mean that he has no authority to assign a white teacher to a Negro school, or a Negro teacher to a white school, without first submitting the matter to the defendant Board to determine if it will make an exception to the general policy. * * *" (Accent added.)

As scheduled, a plenary evidential hearing was held September 23–24, 1965. It was devoted entirely to the issue of "the relationship between employment and assignment of teachers and other school personnel on a racially segregated basis and the adequacy of the plan for the enrollment and assignment of pupils." At its conclusion the District Court took the faculty question under advisement and directed the school board to submit a Constitutional pattern for future pupil assignment.

The Board's report, October 15, 1965, tendered a "Permanent Plan for Desegregation of the Durham City Schools", embracing "the unrestricted freedom of choice" design mentioned with approval in *Wheeler*, supra, 346 F.2d 768, 778. The appellants accepted the pupil assignment provision in itself, but found fault in the plan as a whole, primarily because it did not provide for the elimination of teacher allocations on the basis of race.

Having extended the appellants "full evidentiary hearings", as dictated by Bradley v. School Board, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965), the District Judge approved the "Permanent Plan", and also ruled "[t]hat the application of the plaintiffs for an order requiring the employment and assignment of teachers in the Durham City School System without regard to race [should] be * * * denied." From the final decree signed January 19, 1966 effectuating these views, the pupils and parents appeal. We reverse so much thereof as declined to grant the requested order.

[1, 2] Refusal of the order rested: (1) on the absence in the suit of any teachers as parties, actual or represented, the Court concluding that their omission rendered it without jurisdiction to adjudge their rights; and (2) also on the determination that the plaintiff pupils and parents had "totally failed to prove their allegation that there is any substantial relationship between the employment and assignment of teachers on a basis of race" and the plan proposed by the Board for the enrollment and assignment of pupils. The refusal, we think, was error.

[3] The locus standi of pupils and parents to question faculty assignments was conclusively declared in Bradley v. School Board, supra, 382 U.S. 103, 86 S.Ct. 224. We read the decision as authority for the proposition that removal of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in Brown v. Board of Education, supra, 347 U.S. 483, 74 S.Ct. 686. Hence no proof of the relationship between faculty allocation and pupil assignment was required here. The only factual issue is whether or not race was a factor entering into the employment and placement of teachers.

That the effect of the Durham Board's policy has been a complete racial segregation in teaching staffs is tellingly demonstrated by the District Court's findings of fact, particularly the following:

"1. During the present school year, the Durham City Public School System is composed of 2 high schools, 5 junior high schools, and 18 elementary schools. As of June, 1965, the System employed 652 teachers, 348 white and 304 Negro, and enrolled 14,365 pupils, 7,114 white and 7,251 Negro. By racial composition of students, 1 of the high schools is predominantly white and the other is attended solely by

Negroes; 3 of the junior high schools are predominantly white, and the other 2 are attended solely by Negroes; and 1 of the elementary schools is all-white, 9 are predominantly white, and the remaining 8 are attended solely by Negroes.

"2. In June of 1965, there were 408 Negro pupils attending 13 schools with white pupils and *white faculties*. The balance of the Negro pupils attended schools with *all-Negro faculties* and pupils. All white children attended predominanty white schools with *all-white faculties*. No white child attended any of the 11 all-Negro schools.

"3. In September of 1965, 600 Negroes attended school with white pupils and *white faculties*, 324 of them being in predominantly white schools for the first time. All white children in the System attended predominantly white schools with all-white faculties. The balance of the Negro students attended the eleven all-Negro schools. In September of 1965, 1 white teacher was employed by the all-Negro Hillside High School to teach English to outstanding students, and *all other teachers in the 11 Negro schools were Negroes.*"[1] (Accents have been added and figures substituted in several places for numerical words.)

[4] These findings obviously establish the actual use of race as a determinant in faculty allocations. Hence, we vacate the District Court's judgment insofar as it rejected the appellants' prayer for an order respecting teacher assignments.

[5] In the absence of the teachers as parties to this proceeding, we do not think that the order should require any involuntary assignment or reassignment of a teacher. Vacant teacher positions in the future, as the plaintiffs suggest, should be opened to all applicants, and each filled by the best qualified applicant regardless of race. Moreover, the order should encourage transfers at the next session by present members of the faculty to schools in which pupils are wholly or predominantly of a race other than such teachers'. A number of the faculty members have expressed a willingness to do so. Combined with the employment of new teachers regardless of race, this procedure will within a reasonable time effect the desegregation of the faculty. The presence in Durham of wives of students and faculty members of Duke University and North Carolina College who are qualified and available as teachers provides a ready source of supply to meet any demand for teachers of both races.

With the entry of such an order, we have no reason to disturb the "Permanent Plan" allowing the pupils a freedom of choice in the selection of their schools.

Affirmed in part, reversed in part and remanded.

1. By memorandum dated May 27, 1966, and filed with this court after argument, the following additional assignments were noted:

"A full-time white English teacher at Hillside High School, a predominantly Negro school.

"A full-time white teacher at Shepard Junior High School, a predominantly Negro school.

"A full-time white teacher at W. G. Pearson elementary school, a predominantly Negro school, in a team-teaching situation, with a full-time Negro teacher.

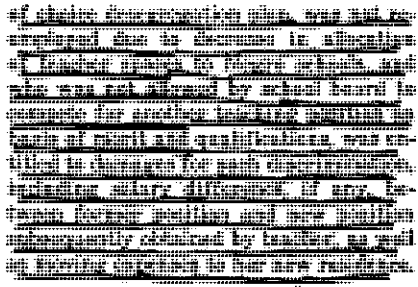
"A white teacher at Whitted Junior High School, a predominantly Negro school.

"A Negro teacher aide at Southside elementary school, a predominantly white school.

"By agreement with the principal and teacher concerned, a second white teacher is under contract to teach next fall at the predominantly Negro Hillside High School.

"A Negro science teacher now under contract is being assigned to teach science both at Durham *High* School, a predominantly white school, and to teach at Hillside, a predominantly Negro school.

"A contract has been extended, but has not yet been signed and returned, for a white music teacher to teach at Whitted Junior High School, a predominantly Negro school."



Reversed and remanded.

Audrey Gillis WALL and the North Carolina Teachers Association, a corporation, Appellants,

v.

The STANLY COUNTY BOARD OF EDUCATION, a public body corporate of Stanly County, North Carolina, Appellee.

No. 11019.

United States Court of Appeals
Fourth Circuit.

Argued March 6, 1967.

Decided May 19, 1967.

Action by Negro school teacher seeking, inter alia, reemployment by county board of education. The United States District Court for the Middle District of North Carolina, at Salisbury, Eugene A. Gordon, J., 259 F.Supp. 238, denied relief, and an appeal was taken. The Court of Appeals, Craven, Circuit Judge, held that Negro school teacher, who had 13 years' experience, who was recommended for reemployment in county school system, but who, after shift in pupil enrollment resulting from freedom

1. **Constitutional Law** ⇐220

Fourteenth Amendment forbids selection, retention, and assignment of public school teachers on basis of race. U.S. C.A.Const. Amend. 14.

2. **Schools and School Districts** ⇐133.15, 141(4)

Reduction in number of students and faculty in previously all-Negro school will not alone justify discharge or failure to reemploy Negro teachers in school system.

3. **Schools and School Districts** ⇐141(1)

Teachers displaced from formerly racially homogeneous schools must be judged by definite objective standards with all other teachers in system for continued employment.

4. **Schools and School Districts** ⇐133.15, 142

Teacher wrongfully discharged or denied reemployment in contravention of principles governing selection, retention, or assignment of public school teachers without racial discrimination is, in addition to equitable remedies, entitled to award of actual damages.

5. **Constitutional Law** ⇐220

Employment of Negro teacher, not as teacher in county school system, but as Negro teacher in Negro school is unlawful as repugnant to Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

2. Since the writing of this opinion two other cases have been decided by this Court which bear upon the difference between operational negligence and unseaworthiness and which seem to us to be consistent with this opinion. Antoine v. Lake Charles Stevedores, Inc. et al., 5 Cir. 1967, 379 F.2d 443, and Robichaux v. Kerr McGee Oil Industries, Inc., 5 Cir. 1967, 376 F.2d 447.

6. Constitutional Law ⇐220

Fourteenth Amendment forbids discrimination on account of race by public school system with respect to employment of teachers. U.S.C.A.Const. Amend. 14.

7. Schools and School Districts ⇐141(1), 142

Negro school teacher, who had 13 years' experience, who was recommended for reemployment in county school system, but who, after shift in pupil enrollment resulting from freedom of choice desegregation plan, was not reemployed due to decrease in allocation of teacher spaces to Negro schools, and who was not allowed by school board to compete for another teaching position on basis of merit and qualifications, was entitled to damages for such discrimination, including salary difference, if any, between former position and new position subsequently obtained by teacher, as well as moving expenses to her new residence. U.S.C.A.Const. Amend. 14.

8. Schools and School Districts ⇐141(6)

County school board, in view of its prior discrimination against Negro teacher who was not reemployed due to decrease in allocation of teacher spaces to Negro schools, would have burden of justifying subsequent denial of reemployment by clear and convincing evidence.

J. LeVonne Chambers, Charlotte, N. C. (Conrad O. Pearson, Durham, N. C., Jack Greenberg and James M. Nabrit, III, New York City, on brief), for appellants.

Henry C. Doby, Jr., Albemarle, N. C. (Staton P. Williams, Albemarle, N. C., on brief), for appellee.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, BELL, WINTER and CRAVEN, Circuit Judges, sitting en banc.

CRAVEN, Circuit Judge:

[1–4] It is now firmly established in this circuit (1) that the Fourteenth Amendment forbids the selection, retention, and assignment of public school teachers on the basis of race; (2) that reduction in the number of students and faculty in a previously all-Negro school will not alone justify the discharge or failure to reemploy Negro teachers in a school system; (3) that teachers displaced from formerly racially homogeneous schools must be judged by definite objective standards with all other teachers in the system for continued employment; and (4) that a teacher wrongfully discharged or denied reemployment in contravention of these principles is, in addition to equitable remedies, entitled to an award of actual damages.[1]

In derogation of these principles, the district court denied relief to Negro school teacher Mrs. Audrey Wall. We reverse.

I.

The facts found by the district court are briefly stated[2] below.

Audrey Gillis Wall, a Negro, is, in the words of the district judge, a teacher of "unchallenged professional and educational qualifications, who has thirteen years of teaching experience, predominantly in Stanly County," North Carolina. She holds A.B. and M.S. degrees and, despite some deficiencies in performance, was recommended by her principal for reemployment for the school year 1965–66. The School Board approved the principal's recommendation of reemployment, contingent *only* upon the allocation of the requisite teaching positions by the State.

Integration came to the Stanly County school system ten years after Brown v. Board of Education, 347 U.S. 483, 74

1. Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Wheeler v. Durham City Bd. of Educ., 363 F.2d 738 (4th Cir. 1966); Franklin v. County School Bd., 360 F.2d 325 (4th Cir. 1966). *Chambers*, *Johnson*, and *Franklin* were authored by Judge J. Spencer Bell, who would have written the opinion for the court in this case but for his death on March 19, 1967.

2. For a more complete statement of findings, see Wall v. Stanly County Bd. of Educ., 259 F.Supp. 238 (M.D.N.C.1966).

S.Ct. 686, 98 L.Ed. 873 (1954), occurring with the transfer of *two* Negro pupils from a Negro school to a formerly all-white school in the school year 1964–65. The system at that time consisted of seventeen public schools and some 7,000 students, of which approximately fifteen percent were Negro.

For the year 1965–66 and prior thereto, there was complete segregation of white and Negro teachers, i. e., no Negro teacher taught white pupils, and no white teacher taught Negro pupils. The first break in teacher segregation occurred in January 1966 when a Negro teacher was employed to teach history in a mostly white school.

On or about June 5, 1965, the allocation of teacher spaces for the school year 1965–66 was received from the North Carolina Board of Education. For the first time such spaces were granted to the Stanly County Board of Education without reference to race and without designation of the school in which the spaces might be used by the Stanly County Board. During the spring of 1965, the Board adopted a freedom of choice plan of pupil enrollment, and as a result thereof, over 300 Negro pupils who had formerly attended all-Negro schools were assigned to formerly white schools for the school year beginning September 1965.

As found by the district court, "the shifts in pupil enrollment as result of the 'freedom of choice plan' resulted in a decrease in the allocation of teacher spaces to the Negro schools and an increase in the allocation of teacher spaces to formerly white or predominantly white schools." Despite this, and again in the words of the district court, "the Board adopted no specific provisions to govern assignment of teachers who might be affected by the shifting of pupil enrollment. The Board did not solicit opinions from either teachers or principals as to what, if any, policy might or should be adopted. Principals were not advised as to whether teachers whose positions were affected by the aforesaid reduced allotments to Negro schools would be reassigned to another school in the system. The Board did not advise the several white principals that they could employ Negro teachers nor Negro principals that they could hire white teachers."

II.

[5, 6] The meaning of the foregoing is very plain. Obviously the Board considered that transfer of Negro pupils from a Negro school diminished the need for Negro teachers in the Negro school, causing Mrs. Wall to lose her job. The premise of such a proposition is that Mrs. Wall was not employed as a teacher in the Stanly County school system but was employed *as a Negro teacher in a Negro school*. Such a premise is unlawful. It is repugnant to the Fourteenth Amendment, which "forbids discrimination on account of race by a public school system with respect to employment of teachers." Franklin v. County School Bd., 360 F.2d 325, 327 (4th Cir. 1966), citing Bradley v. School Bd., 345 F.2d 310, 316 (4th Cir.), rev'd on other grounds, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965).

In his opinion, the district judge said: "It is obvious that if the teacher spaces at Lakeview had not been reduced, Mrs. Wall would have been re-employed for the school year 1965–66." His finding is fully supported by the evidence. It requires reversal of the decision below because Mrs. Wall was not allowed by the School Board to compete for a teaching position in the system on the basis of her merit and qualifications as a teacher. Solely because of her race, she was not considered in comparison with other teacher applicants, about fifty of whom had not previously taught in the system. This sort of invidious discrimination offends the Constitution. E. g., Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); Franklin v. County School Bd., 360 F.2d 325 (4th Cir. 1966); see generally Note, Discrimination in the Hiring and Assignment of Teachers in Public School Systems, 64 Mich.Law Review 692 (1966). We reject the erroneous conclusion of the district court that the decisions of this circuit

in *Chambers* and *Franklin*, requiring an objective and comparative evaluation with *all* other teachers, are not controlling.

III.

[7] Since Mrs. Wall was recommended for reemployment by her principal and his recommendation approved by the School Board—subject only to the allotment of spaces, which was controlled by the same Board—we think the belated and invidiously unfair rejection of her application for reemployment entitles her to recover damages. Smith v. Bd. of Educ., 365 F.2d 770, 784 (8th Cir. 1966); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 193 (4th Cir. 1966); Johnson v. Branch, 364 F.2d 177, 182 (4th Cir. 1966); Rolfe v. County Bd. of Educ., 11 Race Rel.L.Rep. 1841, 1846–47 (E.D.Tenn.1966); Macklin v. County Bd. of Educ., 11 Race Rel.L.Rep. 805, 806 (M.D.Tenn.1966). Mrs. Wall managed to secure employment elsewhere for the school year 1965–66. Proper damage elements will include salary differences, if any, and moving expenses to her new residence. If she should be reemployed in the Stanly County system for the school year 1967–68, she should also be awarded the reasonable expense of moving back to Stanly County.

We further instruct the district court to order the Board to put Mrs. Wall, if she wishes, on the roster of teaching applicants for the school year 1967–68, and to require that she then be considered for employment *objectively* in comparison with *all* teachers. The Board will be ordered to consider her twelve-year experience in the Stanly County school system to the extent it considers seniority as a factor in the retention of other teachers. The Board should be specifically enjoined from considering her race as a factor in determining whether or not she will be reemployed.

[8] If Mrs. Wall should be denied reemployment, the district court will require a full report of the reasons for denial, and will scrutinize it to assure that the School Board has acted in good faith and without regard to race. Because of the Board's prior discrimination against Mrs. Wall, it will carry "the burden of justifying its conduct by clear and convincing evidence." Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 192 (4th Cir. 1966).

IV.

On April 15, 1966, the School Board adopted an extremely comprehensive plan governing the hiring and assigning of personnel in the public schools. The plan establishes standards and procedures for rating and evaluating teachers. It contains definitions and instructions for the application of the standards to a given teacher and methods by which attributes of the teacher are to be evaluated. We think this exhaustive plan, if implemented in good faith, is fully sufficient to assure that "staff and professional personnel will be employed solely on the basis of competence, training, experience, and personal qualification and shall be assigned to and within the schools of the administrative unit without regard to race, color, or national origin * * *."[3]

Aside from the facial adequacy of the new plan of teacher recruitment and assignment, we are advised in open court by counsel that for the school year 1966–67 some progress has been made in integrating the faculty and that now some six or seven Negro teachers are teaching in formerly white schools. On remand, we instruct the district court to make further inquiry into the present degree of implementation of the plan and to consider de novo the question of whether or not an injunction ought to issue. Only if the district court concludes that the plan is being implemented according to its tenor, i. e., that teachers are being hired and assigned without racial discrimination, may it reject the prayer for an injunction. The district court will retain jurisdiction to consider motions in the cause

3. Resolution on Teacher Hiring Policies, Stanly County, North Carolina, Board of Education, April 15, 1966.

as may be necessary to assure fair and equal treatment of *all* teachers and to assure that the plan will not become a paper proclamation of good intentions to be filed away and forgotten.

Reversed and remanded.

Rosa CONTINENTE, d/b/a G. Continente, Plaintiff-Appellant,

v.

John A. CONTINENTE, Defendant-Appellee.

No. 21124.

United States Court of Appeals
Ninth Circuit.

May 5, 1967.

Action for injunctive relief and an accounting of profits and damages concerning alleged trademark infringement and unfair competition. Defendant counterclaimed for cancellation of plaintiff's registered trademark as invalid. The United States District Court for the Northern District of California, Southern Division, George B. Harris, J., entered judgment dismissing both plaintiff's claim and defendant's counterclaim, 244 F.Supp. 688, and plaintiff appealed. The Court of Appeals, Hamley, Circuit Judge, held, inter alia, that although likelihood of confusion of marks existed if same area were served, fact that defendant marketed his grapes only in British Columbia and plaintiff marketed hers only in eastern part of United States required conclusion that as long as such circumstance continued defendant's use of his mark in block letters without embellishment was not likely to lead to confusion or mistake concerning two brands of juice grapes, although both plaintiff and defendant grew their grapes in, and distributed them from, same California town.

Affirmed.

1. Trade Regulation ⇐726

Question of probability of confusion of trademarks partakes more of character of conclusion of law than of a finding of fact as to which Court of Appeals should make an independent determination. Lanham Trade-Mark Act, § 32(1) (a) as amended 15 U.S.C.A. § 1114(1) (a).

2. Trade Regulation ⇐335

Specific instances of confusion need not always be established to warrant a holding that there is a likelihood of confusion of marks. Lanham Trade-Mark Act, § 32(1) (a) as amended 15 U.S.C.A. § 1114(1) (a).

3. Courts ⇐89

In deciding question of confusing similarity of marks, each case must stand on its own facts. Lanham Trade-Mark Act, § 32(1) (a) as amended 15 U.S.C.A. § 1114(1) (a).

4. Trade Regulation ⇐367

Although likelihood of confusion of marks existed if same area were served, fact that defendant marketed his grapes only in British Columbia and plaintiff marketed hers only in eastern part of United States required conclusion that as long as such circumstance continued defendant's use of his mark in block letters without embellishment was not likely to lead to confusion or mistake concerning two brands of juice grapes, although both plaintiff and defendant grew their grapes in, and distributed them from, same California town. Lanham Trade-Mark Act, §§ 8(a), 15, 32(1) (a) as amended 15 U.S.C.A. §§ 1058(a), 1065, 1114(1) (a).

Harris Zimmerman, Gardner & Zimmerman, Oakland, Cal., for appellant.

William G. MacKay, San Francisco, Cal., for appellee.

Before POPE, HAMLEY and DUNIWAY, Circuit Judges.

Shirlette L. BOWMAN, Rhoda M. Bowman, Mildred A. Bowman, Richard M. Bowman and Sandra L. Bowman, Infants, by Richard M. Bowman, their father and next friend, and all others of the plaintiffs, Appellants,

v.

COUNTY SCHOOL BOARD OF CHARLES CITY COUNTY, VIRGINIA et al., Appellees.

No. 10703.

United States Court of Appeals Fourth Circuit.

Argued Jan. 9, 1967.

Decided June 12, 1967.

Appeal, in school desegregation case, from judgment of the United States District Court for the Eastern District of Virginia, at Richmond, John D. Butzner, Jr., J. The Court of Appeals, Haynsworth, Chief Judge, held that existence of choice under freedom of choice plan whereby each Negro pupil had an acknowledged, unrestricted right to attend any school in the school system rather than replacement of plan by system of compulsive assignments to achieve greater intermixture of the races was not a denial of any constitutional right not to be subjected to racial discrimination. The Court further held that case involving, inter alia, School Board's plan for desegregation of faculties would be remanded with direction that some minimal, objective timetable for faculty desegregation be incorporated in the plan.

Remanded.

1. Schools and School Districts ⇐154

"Freedom of choice" employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria is an illusion and an oppression which is constitutionally impermissible.

See publication Words and Phrases for other judicial constructions and definitions.

2. Schools and School Districts ⇐154

The burden of extracting individual pupils from discriminatory, racially orientated school assignments may not be cast upon the pupils or their parents, rather it is the duty of the school boards to eliminate the discrimination which inheres in such a system.

3. Schools and School Districts ⇐154

"Freedom of choice" employed as descriptive of a system in which each pupil or his parents must annually exercise an uninhibited choice which will govern assignments to school is not constitutionally impermissible if each pupil, each year, attends the school of his choice.

4. Schools and School Districts ⇐154

If it is contended that economic or other pressures in the community inhibit the free exercise of choice under freedom of choice plan whereby school pupils have right to attend any school in system, there must be a judicial appraisal of it since freedom of choice plan is acceptable only if the choice is free in the practical context of its exercise.

5. Schools and School Districts ⇐154

If there are extraneous pressures which remove freedom of choice under plan whereby school pupils have right to attend any school in the school system, the school board may be required to adopt affirmative measures to counter such pressures.

6. Schools and School Districts ⇐154

That the Department of Health, Education and Welfare approved school board's plan whereby each Negro pupil was given a freedom of choice as to what school he would attend was not determinative of the plan's constitutional validity.

7. Constitutional Law ⇐67

While administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

8. Schools and School Districts ⇐154

Existence of choice under freedom of choice plan whereby each Negro pupil

had an acknowledged, unrestricted right to attend any school in the school system rather than replacement of plan by system of compulsive assignments to achieve greater intermixture of the races was not a denial of any constitutional right not to be subjected to racial discrimination.

9. Schools and School Districts ⇐141(1)

School discrimination case involving, inter alia, school board's plan for desegregation of faculties was remanded with direction that some minimal, objective timetable for faculty desegregation be incorporated in the plan.

S. W. Tucker, Richmond, Va. (Henry L. Marsh, III, Willard H. Douglas, Jr., Richmond, Va., Jack Greenberg and James M. Nabrit, III, New York City, on brief) for appellants.

Frederick T. Gray, Richmond, Va. (Williams, Mullen & Christian, Richmond, Va., on brief) for appellees.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, J. SPENCER BELL,* WINTER and CRAVEN, Circuit Judges, sitting en banc.

HAYNSWORTH, Chief Judge:

In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignments to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention, though a related point affecting the assignment of teachers is not without merit.

I

"Freedom of choice" is a phrase of many connotations.

[1, 2] Employed as descriptive of a system of permissive transfers out of segregated schools in which the initial assignments are both involuntary and dictated by racial criteria, it is an illusion and an oppression which is constitutionally impermissible. Long since, this court has condemned it.[1] The burden of extracting individual pupils from discriminatory, racial assignments may not be cast upon the pupils or their parents. It is the duty of the school boards to eliminate the discrimination which inheres in such a system.

[3] Employed as descriptive of a system in which each pupil, or his parents, must annually exercise an uninhibited choice, and the choices govern the assignments, it is a very different thing. If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held,[2] and we adhere to our holdings.

[4, 5] Whether or not the choice is free may depend upon circumstances extraneous to the formal plan of the school board. If there is a contention that economic or other pressures in the community inhibit the free exercise of the choice, there must be a judicial appraisal of it, for "freedom of choice" is accept-

* Judge Bell sat as a member of the Court when the case was heard but died before it was decided.

1. Nesbit v. Statesville City Bd. of Educ., 4 Cir., 345 F.2d 333, 334 n. 3; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F.2d 310, 319 & n. 18; Wheeler v. Durham City Bd. of Educ., 4 Cir., 309 F.2d 630, 633; Jeffers v. Whitley, 4 Cir., 309 F.2d 621; Marsh v. County School Bd. of Roanoke County, 4 Cir., 305 F.2d 94; Green v. School Bd. of City of Roanoke, 4 Cir., 304 F.2d 118; Hill v. School Bd. of City of Norfolk, 4 Cir., 282 F.2d 473; Jones v. School Bd. of City of Alexandria, 4 Cir., 278 F.2d 72.

2. Wheeler v. Durham City Bd. of Educ., 4 Cir., 346 F.2d 768, 773; Bradley v. School Bd. of Educ. of City of Richmond, 4 Cir., 345 F.2d 310, 313, vacated and remanded on other grounds, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187. See Jeffers v. Whitley, 4 Cir., 309 F.2d 621.

able only if the choice is free in the practical context of its exercise. If there are extraneous pressures which deprive the choice of its freedom, the school board may be required to adopt affirmative measures to counter them.

A panel of the Fifth Circuit [3] recently had occasion to concentrate its guns upon the sort of "freedom of choice" plan we have not tolerated, but, significantly, the decree it prescribed for its district courts requires the kind of "freedom of choice" plan we have held requisite and embodies standards no more exacting than those we have imposed and sanctioned.

[6, 7] The fact that the Department of Health, Education and Welfare has approved the School Board's plan is not determinative. The actions of that department, as its guidelines, are entitled to respectful consideration, for, in large measure or entirely, they are a reflection of earlier judicial opinions. We reach our conclusion independently, for, while administrative interpretation may lend a persuasive gloss to a statute, the definition of constitutional standards controlling the actions of states and their subdivisions is peculiarly a judicial function.

[8] Since the plaintiffs here concede that their annual choice is unrestricted and unencumbered, we find in its existence no denial of any constitutional right not to be subjected to racial discrimination.

II

[9] Appropriately, the School Board's plan included provisions for desegregation of the faculties. Supplemented at the direction of the District Court, those provisions are set forth in the margin.[4]

3. United States v. Jefferson County Board of Education, 5 Cir., 372 F.2d 836, aff'd on rehearing en banc, 380 F.2d 385; see also, Deal v. Cincinnati Board of Education, 6 Cir., 369 F.2d 55.

4. The School Board of Charles City County recognizes its responsibility to employ, assign, promote and discharge teachers and other professional personnel of the school systems without regard to race, color or national origin. We further recognize our obligation to take all reasonable steps to eliminate existing racial segregation of faculty that has resulted from the past operation of a dual system based upon race or color.

In the recruitment, selection and assignment of staff, the chief obligation is to provide the best possible education for all children. The pattern of assignment of teachers and other staff members among the various schools of this system will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools.

The following procedures will be followed to carry out the above stated policy:

1. The best person will be sought for each position without regard to race, and the Board will follow the policy of assigning new personnel in a manner that will work toward the desegregation of faculties.
2. Institutions, agencies, organizations, and individuals that refer teacher applicants to the school system will be informed of the above stated policy for faculty desegregation and will be asked to so inform persons seeking referrals.
3. The School Board will take affirmative steps including personal conferences with members of the present faculty to allow and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.
4. No new teacher will be hereafter employed who is not willing to accept assignment to a desegregated faculty or in a desegregated school.
5. All Workshops and in-service training programs are now and will continue to be conducted on a completely desegregated basis.
6. All members of the supervisory staff have been and will continue to be assigned to cover schools, grades, teachers and pupils with-

These the District Court found acceptable under our decision in Wheeler v. Durham City Board of Education, 4 Cir., 363 F.2d 738, but retained jurisdiction to entertain applications for further relief. It acted upon a record which showed that white teachers had been assigned to the "Indian school" and one Negro teacher had been assigned to a formerly all white school.

The appellants' complaint is that the plan is insufficiently specific in the absence of an immediate requirement of substantial interracial assignment of all teachers.

On this record, we are unable to say what impact such an order might have upon the school system or what administrative difficulties might be encountered in complying with it. Elimination of discrimination in the employment and assignment of teachers and administrative employees can be no longer deferred,[5] but involuntary reassignment of teachers to achieve racial blending of faculties in each school is not a present requirement on the kind of record before us. Clearly, the District Court's retention of jurisdiction was for the purpose of swift judicial appraisal of the practical consequences of the School Board's plan and of the objective criteria by which its performance of its declared purposes could be measured.

An appeal having been taken, we lack the more current information which the District Court, upon application to it, could have commanded. Without such information, an order of remand, the inevitable result of this appeal, must be less explicit than the District Court's order, with the benefit of such information, might have been.

While the District Court's approval of the plan with its retention of jurisdiction may have been quite acceptable when entered, we think any subsequent order, in light of the appellants' complaints should incorporate some minimal, objective time table.

Quite recently, a panel of the Fifth Circuit Court of Appeals[6] has required some progress in faculty integration for the school year 1967–68. By that decree, school boards are required to take affirmative steps to accomplish substantial desegregation of faculties in as many of the schools as possible for the 1967–68 school year and, wherever possible, to assign more than one member of the minority race to each desegregated faculty. As much should be required here. Indeed, since there was an earlier start in this case, the District Court, with the benefit of current information, should find it appropriate to fashion an order which is much more specific and more comprehensive. What is done on remand, however, must be done upon a supplemented record after an appraisal of the practical, administrative and other

out regard to race, color or national origin.

7. It is recognized that it is more desirous, where possible, to have more than one teacher of the minority race (white or Negro) on a desegregated faculty.

8. All staff meetings and committee meetings that are called to plan, choose materials, and to improve the total educational process of the division are now and will continue to be conducted on a completely desegregated basis.

9. All custodial help, cafeteria workers, maintenance workers, bus mechanics and the like will continue to be employed without regard to race, color or national origin.

10. Arrangements will be made for teachers of one race to visit and observe a classroom consisting of a teacher and pupils of another race to promote acquaintance and understanding.

11. The School Board and superintendent will exercise their best efforts, individually and collectively, to explain this program to school patrons and other citizens of Charles City County and to solicit their support of it.

5. Bradley v. School Bd. of Educ. of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187; Wheeler v. Durham City Bd. of Educ., 4 Cir., 363 F.2d 738.

6. United States v. Jefferson County Bd. of Educ., fn. 3, supra.

problems, if any, remaining to be solved and overcome.

Remanded.

SOBELOFF, Circuit Judge, with whom WINTERS, Circuit Judge, joins, concurring specially.

Willingly, I join in the remand of the cases* to the District Court, for I concur in what this court orders. I disagree, however, with the limited scope of the remand, for I think that the District Court should be directed not only to incorporate an objective timetable in the School Boards' plans for faculty desegregation, but also to set up procedures for periodically evaluating the effectiveness of the Boards' "freedom of choice" plans in the elimination of other features of a segregated school system.

With all respect, I think that the opinion of the court is regrettably deficient in failing to spell out specific directions for the guidance of the District Court. The danger from an unspecific remand is that it may result in another round of unsatisfactory plans that will require yet another appeal and involve further loss of time. The bland discussion in the majority opinion must necessarily be pitched differently if the facts are squarely faced. As it is, the opinion omits almost entirely a factual recital. For an understanding of the stark inadequacy of the plans promulgated by the school authorities, it is necessary to explore the facts of the two cases.

New Kent County. Approximately 1,290 children attend the public schools of New Kent County. The system operated by the School Board consists of only two schools—the New Kent School, attended by all of the county's white pupils, and the Watkins School, attended by all of the county's Negro pupils.

There is no residential segregation and both races are diffused generally throughout the county. Yet eleven buses traverse the *entire* county to pick up the Negro students and carry them to the Watkins School, located in the western half of the county, and ten other buses traverse the *entire* county to pick up the white students for the New Kent School, located in the eastern half of the county. One additional bus takes the county's 18 Indian children to the "Indian" school, located in an adjoining county. Each of the county's two schools has 26 teachers and they offer identical programs of instruction.

Repeated petitions from Negro parents, requesting the adoption of a plan to eliminate racial discrimination, were totally ignored. Not until some months after the present action had been instituted on March 15, 1965, did the School Board adopt its "freedom of choice" plan.[1]

The above data relate to the 1964–1965 school year.[2] Since the Board's "freedom of choice" plan has now been in effect for *two* years as to grades 1, 2, 8, 9, 10, 11 and 12 and one year as to all other grades, clearly this court's remand should embrace an order requiring an evaluation of the success of the plan's operation over that time span, not only as to faculty but as to pupil integration as well. While the court does not order an inquiry in the District Court as to pupil integration, it of course does not

* This special concurrence is directed not only to Bowman v. County School Bd. of Charles City County, but also Green v. County School Bd. of New Kent County, 4 Cir., 382 F.2d 338, decided this day.

1. As this circuit has elsewhere said, "Such a last minute change of heart is suspect, to say the least." Cypress v. The Newport News General & Nonsectarian Hospital Ass'n, 375 F.2d 648, 658 (4th Cir. Mar. 9, 1967). See also Lankford v. Gelston, 364 F.2d 197, 203 (4th Cir. 1966). Of course, in the present case, the District Court has noted that the plan was adopted in order to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1964), and thus ensure the flow of federal funds.

2. These data are culled from answers to plaintiffs' interrogatories. Neither side has furnished us or the District Court with more recent data. In oral argument, the defendant replied obscurely and unspecifically to inquiries from the bench as to what progress the county had made.

forbid it. Since the District Judge retained the case on the docket, the matter will be open on remand to a thorough appraisal.

Charles City County. Approximately 1,800 children attend public schools in Charles City County. As in New Kent County, Negroes and whites live in the same neighborhoods and, similarly, segregated buses (Negro, Indian and white) traverse many of the same routes to pick up their respective charges.[3] The Board operates four schools in all—Ruthville, a combined elementary and high school exclusively for Negroes; Barnetts, a Negro elementary school; Charles City, a combined elementary and high school for whites; and Samaria, a combined elementary and high school for Indian children. Thus, as plaintiffs point out, the Board well into the second decade after the 1954 *Brown* decision, still maintains "what is in effect three distinct school systems—each organized along racial lines—with hardly enough pupils for one system!"[4] The District Court found that "the Negro elementary schools serve geographical areas. The other schools serve the entire county." This contrasting treatment of the races plainly exposes the prevailing discrimination. For the 1964-65 school year, only eight Negro children were assigned to grades 4, 6, 7, 8, 9, 10 and 11 at the all-white Charles City School—an instance of the feeblest and most inconsequential tokenism.

Again, as in New Kent County, Negro parents on several occasions fruitlessly petitioned the School Board to adopt a desegregation plan. This suit was instituted on March 15, 1965 and the Board adopted the plan presently under consideration on August 6, 1965. Not until June 1966 did the Board assign a single Negro teacher to the all-white faculty at Charles City School. Apart from this faint gesture, however, the faculties of the Negro and white schools remain totally segregated.[5]

The majority opinion implies that this court has gone as far as the Fifth Circuit and that the "freedom of choice" plan which that circuit has directed its district courts to prescribe "embodies standards no more exacting than those we have imposed and sanctioned." If this court is willing to go as far as the Fifth Circuit has gone, I welcome the resolve.[6] It may be profitable, therefore, to examine closely what the Court of Appeals of that jurisdiction has recently said and done.[7] We may then see how much further our court needs to go

3. The Eighth Circuit has recently held that the operation of two school buses, one for Negro children and one for white, along the same route, is impermissible. "While we have no authority to strike down transportation systems because they are costly and inefficient, we must strike them down if their operation serves to discourage the desegregation of the school systems." Kelley v. Altheimer, Arkansas Public School District, 378 F.2d 483 (8th Cir. Apr. 12, 1967).

4. The Board seems to go to an extreme of inefficiency and expense in order to maintain the segregated character of its schools, indulging in the luxury of three separate high school departments to serve a total of approximately 600 pupils, 437 of whom are in one school, and three separate and overlapping bus services.

5. Three of the Board's eight teachers in the 175 pupil "Indian" school are white, the other five are Indian.

The Board asserts that it is "earnestly" seeking white teachers for the nine existing vacancies in the Negro schools, but so far its efforts have not met with success. This is not surprising, considering that the Board has formally declared that it "does not propose to advertise vacancies in papers as this would likely cause people of both races to apply who are not qualified to teach."

6. A recent article in the Virginia Law Review declares the Fifth Circuit to be "at once the most prolific and the most progressive court in the nation on the subject of school desegregation." Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 VA.L.REV. 42, 73 (1967).

7. United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), aff'd on rehearing en banc, 380 F.2d 385 (5th Cir., Mar. 29, 1967).

to bring itself abreast of the Fifth Circuit.

I. *Pupils*

Under the plans of both Charles City County and New Kent County, only children entering grades one *or* eight are *required* to express a choice. Freedom of choice is *permitted* children in all other grades, and "any pupil in grades other than grades 1 and 8 for whom a choice of school is not obtained *will be assigned to the school he is now attending.*"

In sharp contrast, the Fifth Circuit has expressly abolished "permissive" freedom of choice and ordered *mandatory* annual free choice for *all* grades, and "[a]ny student who has not exercised his choice of school within a week after school opens *shall be assigned to the school nearest his home* * * *." [8] This is all that plaintiffs have been vainly seeking in New Kent County—that students be assigned to the schools nearest their homes.

If, in our cases, those who failed to exercise a choice were to be assigned to the schools nearest their homes, as the Fifth Circuit plan provides, instead of to the schools they previously attended, as directed in the plans before us, there would be a measure of progress in overcoming discrimination. As it is, the plans manifestly perpetuate discrimination. In view of the situation found in New Kent County, where there is no residential segregation, the elimination of the dual school system and the establishment of a "unitary, non-racial system" could be readily achieved with a minimum of administrative difficulty by means of geographic zoning—simply by assigning students living in the eastern half of the county to the New Kent School and those living in the western half of the county to the Watkins School. Although a geographical formula is not universally appropriate, it is evident that here the Board, by separately busing Negro children across the entire county to the "Negro" school, and the white children to the "white" school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning. The conditions in this county present a classical case for this expedient.

In Charles City County, *Negro* elementary school children are geographically zoned, while *white* elementary school children are not, despite the conceded fact that the children of both races live in all sections of the county. Surely this curious arrangement is continued to prop up and preserve the dual school system proscribed by the Constitution and interdicted by the Fifth Circuit:

> "The Court holds that boards and officials administering public schools in this circuit have the affirmitive duty under the Fourteenth Amendment to bring about an *integrated, unitary* school system in which there are no Negro schools and no white schools—just schools. * * * In fulfilling this duty it is not enough for school authorities to offer Negro children the opportunity to attend formerly all-white schools. The necessity of overcoming the effects of the *dual school system* in this circuit requires integration of faculties, facilities, and activities, as well as students." [9]

The Fifth Circuit stresses that the goal is "a unitary, non-racial system" and the question is whether a free choice plan will materially further the attainment of this goal. Stating that courts must continually check the sufficiency of school boards' progress toward the goal, the Fifth Circuit decree requires school authorities to report regularly to the district courts to enable them to evaluate compliance "by measuring the performance." In fashioning its decree, that circuit gave great weight to the percentages referred to in the HEW Guide-

8. United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 391 (5th Cir., Mar. 29, 1967) (en banc). (Emphasis supplied.)

9. 380 F.2d at 389 (en banc). (Emphasis supplied.)

lines,[10] declaring that they establish "minimum" standards

> "for measuring the effectiveness of freedom of choice as a useful tool. * * * If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; *they should try other tools.*"[11]

"Freedom of choice" is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects.[12] If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a "unitary, non-racial system."

While I would prefer it if this court were more explicit in establishing requirements for periodic reporting by the school officials, I assume that the District Court will do this, rather than place the burden upon the plaintiffs to collect the essential data to show whether the free choice plan is materially furthering the achievement of "a unitary, non-racial system." [13]

A significant aspect of the Fifth Circuit's recent decree that, by implication, this court has adopted, deserves explicit

10. "[S]trong policy considerations support our holding that the standards of court-supervised desegregation should not be lower than the standards of HEW-supervised desegregation. The Guidelines, of course, cannot bind the courts; we are not abdicating any judicial responsibilities. [Footnote omitted.] But we hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964. In evaluating desegregation plans, district courts should make few exceptions to the Guidelines and should carefully tailor those so as not to defeat the policies of HEW or the holding of this Court."

United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 848 (5th Cir., Dec. 29, 1966), adopted en banc, 380 F.2d 385 (5th Cir., Mar. 29, 1967). Cf. Cypress v. Newport News Gen. Hosp., 375 F.2d 648, n. 15 (4th Cir., Mar. 9, 1967).

11. 380 F.2d at 390 (Emphasis supplied.) The HEW Guidelines provide: (1) if 8 or 9 percent of the Negro students in a school district transferred from segregated schools during the first year of the plan, the total transfers the following year must be on the order of at least *twice* that percentage; (2) if only 4 or 5 percent transferred, a "substantial" increase in the transfers will be expected the following year—bringing the total to at least *triple* the percentage of the previous year; (3) if less than 4 percent transferred the previous year, then the rate of increase in total transfers for the following year must be proportionately greater than that under (2); and (4) if no students transferred under a free choice plan, then unless a very "substantial start" is made in the following year, the school authorities will "be required to adopt a different type of plan." HEW Reg. A., 45 C.F.R. § 181.54 (Supp.1966).

In both New Kent County and Charles City County, at least some grades have operated under a "freedom of choice" plan for two years. In Charles City County, only 0.6% of the Negro students transferred to the white school for the 1964–65 session. Under the standards subscribed to by the Fifth Circuit, therefore, a minimum of 6% of the Negro pupils in that county should have transferred to the "white" school the following year. Less than this percentage would indicate that the free choice plan was "ineffective, longer on promises than performance," and that the school officials "should try other tools"—e. g., geographic zoning or pairing of grades.

In New Kent County, no Negro students transferred during the first year of the plan. Thus, unless the requisite "substantial start" was made the following year, school officials *must* adopt a different plan—one that will work.

12. Judge Wisdom, in Singleton v. Jackson Munic. Separate School Dist., 355 F. 2d 865, 871 (5th Cir. 1966), referred to "freedom of choice" plans as a "haphazard basis" for the administration of schools.

13. See Section IX of the decree issued in United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 395 (5th Cir. Mar. 29, 1967) (en banc) providing for detailed reports to the district courts.

recognition. The *Jefferson County* decree orders school officials, "without delay," to take appropriate measures for the protection of Negro students who exercise a choice from "harassment, intimidation, threats, hostile words or acts, and similar behavior." Counsel for the school boards assured us in oral argument that relations between the races are good in these counties, and that no incidents would occur. Nevertheless, the *fear* of incidents may well intimidate Negroes who might otherwise elect to attend a "white" school.[14] To minimize this fear, school officials must demonstrate unequivocally that protection will be provided. It is the duty of the school boards actively to oversee the process, to publicize its policy in all segments of the population and to enlist the cooperation of police and other community agencies.[15]

The plaintiffs vigorously assert that the adoption of the Board's free choice plan in Charles City County, without further action toward equalization of facilities, will not cure present gross inequities characterizing the dual school system. A glaring example is the assignment of 135 commercial students to one teacher in the Negro school in contrast to the assignment of 45 commercial students per teacher in the white school and 36 in the Indian school. In the *Jefferson County* decree, the Fifth Circuit directs its attention to such matters and explicitly orders school *officials* to take "prompt steps" to correct such inequalities. School authorities, who hold responsibility for administration, are not allowed to sit back complacently and expect unorganized pupils or parents to effect a cure for these shockingly discriminatory conditions. The decree provides:

> "Conditions of overcrowding, as determined by pupil-teacher ratios and pupil-classroom ratios shall, to the extent feasible, be *distributed evenly* between schools formerly maintained for Negro students and those formerly maintained for white students. If for any reason it is not feasible to improve sufficiently any school formerly maintained for Negro students, * * * such school shall be *closed* as soon as possible, and students enrolled in the

14. Various factors, some subtle and some not so subtle, operate effectively to maintain the status quo and keep Negro children in "their" schools. Some of these factors are listed in the recent report issued by the U. S. Commission on Civil Rights:

> "Freedom of choice plans accepted by the Office of Education have not disestablished the dual and racially segregated school systems involved, for the following reasons: a. Negro and white schools have tended to retain their racial identity; b. White students rarely elect to attend Negro schools; c. Some Negro students are reluctant to sever normal school ties, made stronger by the racial identification of their schools; d. Many Negro children and parents in Southern States, having lived for decades in positions of subservience, are reluctant to assert their rights; e. Negro children and parents in Southern States frequently will not choose a formerly all-white school because they fear retaliation and hostility from the white community; f. In some school districts in the South, school officials have failed to prevent or punish harassment by white children who have elected to attend white schools; g. In some areas in the South where Negroes have elected to attend formerly all-white schools, the Negro community has been subjected to retaliatory violence, evictions, loss of jobs, and other forms of intimidation."

U. S. COMM'N ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES—1965-66, at 51 (1966). In addition to the above enumeration, a report of the Office of Education has pointed out that Negro children in the high school grades refrain from choosing to transfer because of reluctance to assume additional risks close to graduation. Coleman & Campbell, Equality of Educational Opportunity (U.S. Office of Education, 1966). See also Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary, 89th Cong., 2d Sess., ser. 23 (1966).

15. HEW Reg. A, 45 C.F.R. § 181.17(c) (Supp.1966).

school shall be reassigned on the basis of freedom of choice." [16]

II. *Faculty*

Defendants unabashedly argue that they cannot be compelled to take any affirmative action in reassigning teachers, despite the fact that teachers are hired to teach in the *system*, not in a particular school. They assert categorically that "they are not required under the Constitution to desegregate the faculty." This is in the teeth of Bradley v. School Bd. of Educ. of City of Richmond, 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965).

Having made this declaration, they say that they have nevertheless submitted a plan which does provide for faculty desegregation, but circumspectly they add that "it will require time and patience." They protest that they have done all that could possibly be demanded of them by providing a plan which would permit "a constructive beginning." This argument, lacks appeal an eighth of a century after *Brown*.[17] Children too young for the first grade at the time of that decision are beyond high school age by now. Yet their entire school experience, like that of their elder brothers and sisters, parents and grandparents, has been one of total segregation. They have attended only a "Negro" school with an all Negro staff and an all Negro student body. If their studies encompassed Brown v. Bd. of Educ., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180 they must surely have concluded sadly that "the law of the land" is singularly ineffective as to them.

The plans of both counties grandly profess that the pattern of staff assignment "will not be such that only white teachers are sought for predominantly white schools and only Negro teachers are sought for predominantly Negro schools." No specific steps are set out, however, by which the boards mean to integrate faculties. It cannot escape notice that the plans provide only for assignments of "*new* personnel in a manner that will *work towards* the desegregation of faculties." As for teachers presently employed by the systems, they will be "allowed" (in Charles City County, the plan reads "allowed and encouraged") to accept transfers to schools in which the majority of the faculty members are of the opposite race. We are told that heretofore an average of only 2.6 new white teachers have been employed annually in New Kent County. Thus the plan would lead to desegregation only by slow attrition. There is no excuse for thus protracting the corrective process. School authorities may not abdicate their plain duty in this fashion. The plans filed in these cases leave it to the *teachers*, rather than the Board, to "disestablish dual, racially segregated school systems" and to establish "a unitary, non-racial system." This the law does not permit.

As the Fifth Circuit has put it, "school authorities have an *affirmative duty* to break up the historical pattern of segregated faculties, the hallmark of the dual system." [18]

> "[U]ntil school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system." [19]

16. 380 F.2d at 393 (en banc). (Emphasis supplied.)

17. "The rule has become: the later the start the shorter the time allowed for transition." Lockett v. Bd. of Educ. of Muscogee County, 342 F.2d 225, 228 (5th Cir. 1965). See Rogers v. Paul, 382 U.S. 198, 199, 86 S.Ct. 358, 15 L.Ed.2d 265 (1965); Bradley v. School Bd. of Educ. of City of Richmond, 382 U.S. 103, 86 S.Ct. 224 (1965); Griffin v. County School Bd., 377 U.S. 218, 229, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); Watson v. City of Memphis, 373 U.S. 526, 530, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963).

18. 372 F.2d at 895.

19. United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 892 (5th Cir. 1966), adopted en banc, 380 F.2d 385 (5th Cir. Mar. 29, 1967).
This thought has been similarly expressed in Bradley v. School Bd. of Educ.

In contrast to the frail and irresolute plans submitted by the appellees, the Fifth Circuit has ordered school officials within its jurisdiction not only to make *initial* assignments on a non-discriminatory basis, but also to *reassign* staff members "to eliminate *past* discriminatory patterns."

For this reason, I wholeheartedly endorse the majority's remand for the inclusion of an *objective* timetable to facilitate evaluation of the progress of school authorities in desegregating their faculties. I also join the majority in calling upon the District Court to fashion a specific and comprehensive order requiring the boards to take firm steps to achieve *substantial* desegregation of the faculties. At this late date a desegregation plan containing only an indefinite pious statement of future good intentions does not merit judicial approval.

I must disagree with the prevailing opinion, however, where it states that the record is insufficiently developed to order the school systems to take further steps at this stage. No legally acceptable justification appears, or is even faintly intimated, for not immediately integrating the faculties. The court underestimates the clarity and force of the facts in the present record, particularly with respect to New Kent County, where there are only two schools, with identical programs of instruction, and each with a staff of 26 teachers. The situation presented in the records before us is so patently wrong that it cries out for immediate remedial action, not an inquest to discover what is obvious and undisputed.

It is time for this circuit to speak plainly to its district courts and tell them to require the school boards to get on with their task—no longer avoidable or deferrable—to integrate their faculties. In Kier v. County School Bd. of Augusta County, 249 F.Supp. 239, 247 (W.D.Va. 1966), Judge Michie, in ordering complete desegregation by the following years of the staffs of the schools in question, required that "the percentage of Negro teachers in each school in the system should approximate the percentage of the Negro teachers in the entire system" for the previous year. See Dowell v. School Bd. of Oklahoma City, 244 F.Supp. 971, 977, 978 (W.D.Okl. 1965), aff'd 375 F.2d 158 (10th Cir., Jan. 23, 1967), cert. denied, 387 U.S. ——, 87 S.Ct. 2054, 18 L.Ed.2d 993 (U.S. May 29, 1967). While this may not be the precise formula appropriate for the present cases, it does indicate the attitude that district courts may be expected to take if this court speaks with clarity and firmness.

III. *The Briggs v. Elliott Dictum*

The defendants persist in their view that it is constitutionally permissible for *parents* to make a choice and assign their children; that courts have no role to play where segregation is not actively *enforced*. They say that *Brown* only proscribes enforced segregation, and does not command action to undo existing consequences of earlier enforced segregation, repeating the facile formula of Briggs v. Elliott.[20]

The court's opinion recognizes that "it is the duty of the school boards to eliminate the discrimination which inheres" in a system of segregated schools where the "initial assignments are both involuntary and dictated by racial criteria," but seems to think the system under consideration today "a very different

of City of Richmond, 345 F.2d 310, 323 (4th Cir. 1965) (concurring opinion): "It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated." (Emphasis in the original.)

20. "Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination." 132 F.Supp. 776, 777 (E.D.S.C. 1955).

thing." I fail to perceive any basis for a distinction. Certainly the two counties with which we are here concerned, like the rest of Virginia, historically had *de jure* segregation of public education, so that by the court's own definition, the boards are under a duty "to eliminate the discrimination which inheres" in such a system. Whether or not the schools now permit "freedom of choice," the segregated conditions initially created *by law* are still perpetuated by relying primarily on Negro pupils "to extricate themselves from the segregation which has long been firmly established and resolutely maintained * * *." [21] "[T]hose who operate the schools formerly segregated by law, and not those who attend, are responsible for school desegregation." [22]

It is worth recalling the circumstances that gave birth to the Briggs v. Elliott dictum—it is no more than dictum. A three-judge district court over which Judge Parker presided had denied relief to South Carolina Negro pupils and when this decision came before the Supreme Court as part of the group of cases reviewed in Brown v. Bd. of Educ., the Court overruled the three-judge court and issued its mandate to admit the complaining pupils to public schools "on a racially nondiscriminatory basis with all deliberate speed." Reassembling the three-judge panel, Judge Parker undertook to put his gloss upon the Supreme Court's decision and coined the famous saying.[23] This catchy apothegm immediately became the refuge of defenders of the segregation system, and it has been quoted uncritically to eviscerate the Supreme Court's mandate.[24]

Having a deep respect for Judge Parker's capacity to discern the lessons of experience and his high fidelity to duty and judicial discipline, it is unnecessary

21. Bradley v. School Bd. of City of Richmond, 345 F.2d 310, 322 (4th Cir. 1965) (concurring opinion).

22. Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 VA.L.REV. 42, 45 (1967).

See Dowell v. School Bd. of Oklahoma City, 244 F.Supp. 971, 975, 981 (W.D. Okl.1965), aff'd 375 F.2d 158 (10th Cir. Jan. 23, 1967), cert. denied, 387 U.S. 931, 87 S.Ct. 2054, 18 L.Ed.2d 093 (U.S. May 20, 1967):

> "The Board maintains that it has no affirmative duty to adopt policies that would increase the percentage of pupils who are obtaining a desegregated education. But a school system does not remain static, and *the failure to adopt an affirmative policy is itself a policy*, adherence to which, at least in this case, has slowed up—in some cases—reversed the desegregation process.
>
> * * * * *
>
> The duty to disestablish segregation is clear in situations such as Oklahoma City, where such school segregation policies were in force and their effects have not been corrected." (Emphasis supplied.)

23. See n. 20, supra.

24. Judge Wisdom, in the course of a penetrating criticism of the *Briggs* decision, says:

> "*Briggs* overlooks the fact that Negroes collectively are harmed when the state, by law or custom, operates segregated schools *or a school system with uncorrected effects of segregation.*
>
> * * * * *
>
> Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the state's system of de jure school segregation and *the organized undoing of the effects of past segregation.*
>
> * * * * *
>
> The central vice in a formerly de jure segregated public school system is apartheid by dual zoning * * *. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending, by definition, inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate *the school from which a transferee comes* as well as the school to which he goes. * * * [T]he overriding right of Negroes as a class [is] to a *completely integrated* public education."

372 F.2d at 866. (Emphasis supplied.)

for me to speculate how long he would have adhered to his view, or when he would have abandoned the dictum as unworkable and inherently contradictory.[25] In any event, the dictum cannot withstand the authority of the Supreme Court or survive its exposition of the spirit of the *Brown* holding, as elaborated in Bradley v. School Bd., 382 U.S. 103, 86 S.Ct. 224, 15 L.Ed.2d 187 (1965); Goss v. Bd. of Educ., 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963); Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L. Ed.2d 5, 19 (1958).

Anything that some courts may have said in discussing the obligation of school officials to overcome the effects of *de facto* residential segregation, caused by private acts and not imposed by law, is certainly not applicable here. Ours is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs* dictum.

> "The Fourth is apparently the only circuit of the three that continues to cling to the doctrine of Briggs v. Elliott and embraces freedom of choice as a final answer to school desegregation in the absence of intimidation and harassment." [26]

We should move out from under the incubus of the Briggs v. Elliott dictum and take our stand beside the Fifth and the Eighth Circuits.

25. Shortly after pronouncing his dictum, in another school case Judge Parker nevertheless recognized that children cannot enroll themselves and that the duty of enrolling them and operating schools in accordance with law rests upon the officials and cannot be shifted to the pupils or their parents. Carson v. Warlick, 4 Cir., 238 F.2d 724, 728 (1956).

26. Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 VA.L.REV. 42, 72 (1967). See United States v. Jefferson County Bd. of Educ., 380 F.2d 385 (5th Cir., Mar. 29, 1967) (en banc); Singleton v. Jackson Munic. Separate School Dist., 348 F.2d 729, 730 n. 5 (5th Cir. 1965) ("[T]he second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Park-

Howard Douglas COPPEDGE, a minor, by his Father and Next Friend, Rev. Luther Coppedge, et al., Plaintiffs, and United States of America, by Ramsey Clark, Attorney General, Plaintiff-Intervenor, Appellees,

v.

The FRANKLIN COUNTY BOARD OF EDUCATION, a public body corporate, Warren W. Smith, Superintendent, Mrs. T. H. Dickens, Chairman, Jones H. Winston, Albert C. Fuller, Lloyd A. West, Horace W. Baker, members of the Franklin County Board of Education, Appellants.

No. 11794.

United States Court of Appeals
Fourth Circuit.

Argued Feb. 5, 1968.

Decided April 8, 1968.

As Corrected on Denial of Rehearing
May 31, 1968.

School desegregation case. The United States District Court for the Eastern District of North Carolina, at

Raleigh, Algernon L. Butler, Chief Judge, 273 F.Supp. 289, ordered school board to abandon its freedom of choice plan and to adopt new plan for pupil assignment based upon unitary system of geographic attendance zones or upon consolidation of grades or schools, and board appealed. The Court of Appeals, Haynsworth, Chief Judge, held that school board was properly required to adopt new plan where it appeared that choice had not been free in practical context of its exercise in county and that board had done nothing to relieve pressures inhibiting free exercise of right of choice.

Affirmed.

1. Schools and School Districts ⇐13, 155

School board which had instituted freedom of choice plan was properly required to adopt instead plan for pupil assignment based on unitary system of geographic attendance zones or upon consolidation of grades or schools where it appeared that choice had not been free in practical context of its exercise in county and that board had done nothing to relieve pressures inhibiting free exercise of right of choice.

2. Schools and School Districts ⇐13

Freedom of choice is acceptable plan for desegregation of public school system only if choice is free in practical context of its exercise.

3. Schools and School Districts ⇐13

Freedom of choice could not be extended to Negroes who preferred to continue attending all-Negro schools where, under circumstances, real and practical freedom of choice could not be extended to those Negroes who wished to go to formerly all-white schools.

Edward F. Yarborough, Louisburg, N. C., and Irvin B. Tucker, Jr., Raleigh, N. C. (Charles M. Davis and W. M. Jolly, Louisburg, N. C., on brief), for appellants.

J. LeVonne Chambers, Charlotte, N. C. (Jack Greenberg, James M. Nabrit, III, Robert Belton, James N. Finney, New York City, and Conrad O. Pearson, Durham, N. C., on brief), for plaintiffs-appellees.

Frank E. Schwelb, Atty., Dept. of Justice (Stephen J. Pollak, Asst. Atty. Gen., and Francis H. Kennedy, Atty., Dept. of Justice, on brief), for plaintiff-intervenor.

Linwood T. Peoples, Henderson, N. C., for amici curiae.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

HAYNSWORTH, Chief Judge:

[1] The School Board of a county in which there has been much Ku Klux Klan activity appeals from an order requiring it to abandon its freedom of choice plan and to adopt a new plan for pupil assignments based upon a unitary system of geographic attendance zones or upon the consolidation of grades or schools or both. Since it clearly appears that the School Board did nothing to relieve the pressures inhibiting the free exercise of the right of choice, the District Judge properly required the Board to turn to other measures.

The School Board of Franklin County, North Carolina took no steps to desegregate its schools until 1965. It then adopted a freedom of choice plan. There followed, however, numerous acts of violence and threats directed against Negro members of the community, particularly those requesting transfers of their children into formerly all-white schools. Shots were fired into houses, oil was poured into wells and some of the Negro leaders were subjected to a barrage of threatening telephone calls. The violence was widely reported in the local press, and an implicit threat was carried home to everyone by publication of the names of Negro applicants for transfer.

The School Board did nothing to counter or alleviate these conditions. It took the position that it was not responsible for the threats and acts of violence, but

it did not recognize its responsibility to assure true freedom in the exercise of the right of choice or to adopt some other plan for the assignment of pupils which would relieve them from extraneous pressures. When ordered by the District Court in 1966 to encourage faculty transfers to desegregate faculties, it contented itself with the circulation of a staff memorandum, quoting that portion of the Court's order. Thereafter it did assign two Negro librarians to two white schools and a white librarian and a part-time English teacher to one all-Negro school, but that was insubstantial progress in those three schools and the faculties of the remaining nine schools continued to be entirely segregated. In the most charitable view, the School Board's response to the Court's order to encourage faculty transfers across racial lines was wooden and little calculated to procure the result the Court envisioned.

The School Board took no other steps to alleviate the threatening conditions. It offered no special protection. It gave no assurances. It did nothing.

Under the circumstances, it is not surprising that few Negro pupils availed themselves of the right of transfer into a formerly all-white school and that 98.5% of the Negro pupils in the district remained in all-Negro schools.

Faced with these circumstances in the summer of 1967, the Court ordered the School Board to transfer to formerly all-white schools a sufficient number of Negro pupils to bring the Negro enrollment in formerly all-white schools up to 10% of the total Negro pupil population.[1] For the 1968–69 school year, the Court ordered the School Board to adopt and submit a plan of involuntary assignments based upon geographic attendance zones or upon the consolidation of grades or schools or both. The latter suggestion was born of the apparent fact that throughout the school district white and Negro schools are paired in relatively close proximity to each other.

It is that order in its application to the school year 1968–1969 that the School Board contests, contending that it was entitled to maintain its freedom of choice plan, notwithstanding its inaction in its support.

Fifty-five of the Negro pupils involuntarily transferred for the 1967–1968 school year to formerly all-white schools obtained a lawyer and sought intervention in this Court in support of a freedom of choice plan. They want the right to remain in the familiar surroundings of all-Negro schools.[2]

[2] In Bowman v. County School Board of Charles City County, 4 Cir., 382 F.2d 326, we took pains to point out that freedom of choice is an acceptable plan for the desegregation of a public school system only if the choice is free in the practical context of its exercise. The record here abundantly supports the district court's finding that the choice has not been free in the practical context of its exercise in Franklin County, North Carolina. The deliberate acts of violence and despoiliation and the repeated threats and harassments were clearly calculated to have an inhibiting effect upon the entire Negro population, an effect that was clearly enhanced by the wide publicity given to it and made extremely pointed by the publication of the names of transfer applicants and their parents. Since the School Board had done nothing to remedy the situation, to insure freedom in the exercise of the right of choice or to modify its assignment plan, the District Court was plainly right in requiring the School Board to

1. We do not pause to consider the propriety of that interim measure under the Civil Rights Act of 1964, particularly 42 U.S. C.A. §§ 2000c(b) and 2000c6(a). A substantial part of the school year is now over and no one, not even the protesting Negro transferees, request reassignment at this time of the year.

2. The petition to intervene was not allowed, but they were heard as amicus curiae in support of reversal. Our refusal to allow formal intervention in this Court is, of course, without prejudice to any application they may subsequently file for intervention in the District Court.

turn to something else. Indeed, it would have been very derelict in its duty had it permitted the School Board to proceed on in its indifferent way after its less than half-hearted compliance with its faculty desegregation order and the abundant evidence that the intimidating activity had indeed had a chilling effect on the Negro residents of the district.

[3] As to the applicants for intervention, if a real and practical freedom of choice cannot be extended to those Negroes who wish to go to formerly all-white schools, it cannot be extended to those who have different preferences.

On the record made before it in the summer of 1967, the Court quite naturally and properly concluded that the situation called for drastic measures and that no pupil choice should have any place in it.

We conclude that the Court's order was well within the range of the discretion vested in it.

Affirmed.

ALBERT V. BRYAN, Circuit Judge (concurring specially):

While I am concurring in the majority opinion, I do not want my assent to be construed as approving these portions of the District Court's decree:

(1) The transfer of pupils with an eye to a racial balancing of students in any school. In my reading the 1964 Civil Rights Act, 42 USC 2000c and 2000c-6 (a), forbids "any order [of a Federal court] seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another".

(2) The restriction upon the newspaper publication of the names of the transferring pupils, for it violates the First Amendment. This is official public information, and no matter the motive of the publisher, it cannot be suppressed.

The task of the District Judge was not enviable, and he acted conscientiously to meet the outrageous and cowardly acts of the criminal element. As the present school session expires in a few weeks, and the points I now make may thereafter become moot, I join in the Court's opinion.

Peter M. MELCHIORRE, Appellant,

v.

CALIFORNIA CANNERS AND GROWERS, an unincorporated association, Appellee.

No. 11988.

United States Court of Appeals
Fourth Circuit.

Argued March 7, 1968.

Decided April 25, 1968.

Action by distributor against canner for terminating without notice distributorship of canner's products. The United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, J., entered summary judgment for defendant and plaintiff appealed. The Court of Appeals, Albert V. Bryan, Circuit Judge, held that, even though there was no agreed duration of arrangement whereby distributor was to devote his best efforts to promoting tomato products of canner and to handle no other tomato products which conflicted with canner's brands and contract was cancelable at will of either party, canner was obligated to give distributor reasonable warning of intention to bring venture to a close and its notice that distributorship had been cancelled as of a month before rendered canner liable to distributor for termination without due notice.

Reversed and remanded.

Mamie E. FELDER et al., Appellees,

v.

HARNETT COUNTY BOARD OF EDUCATION and G. T. Proffit, Superintendent of the Schools of Harnett County, Appellants.

No. 12894.

United States Court of Appeals
Fourth Circuit.

Argued Feb. 3, 1969.

Decided April 22, 1969.

Appeal from order of the United States District Court for the Eastern District of North Carolina, at Raleigh, Algernon L. Butler, Chief Judge, requiring of defendant board of education more specificity in its plan for desegregation of county schools. The Court of Appeals, Craven, Circuit Judge, held that facts that after three years of operation of freedom-of-choice plan only 4.3% of Negro students were attending previously all-white schools and that there were no white students in predominantly Negro schools justified conclusion that freedom-of-choice plan was inadequate to convert school system into a unitary, nonracial system and justified order for submission of plan of desegregation.

Affirmed.

Sobeloff and Winter, Circuit Judges, dissented in part and Albert V. Bryan, Circuit Judge, dissented.

1. Schools and School Districts ⇐13

Freedom-of-choice is but a means to end of achieving a nonracial system of public education and school board has affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch, a system in which there are no white schools and no Negro schools but just schools.

2. Schools and School Districts ⇐13

Facts that after three years of operation of freedom-of-choice plan only 4.3% of Negro students were attending previously all-white schools and that there were no white students in predominantly Negro schools justified conclusion that freedom-of-choice plan was inadequate to convert school system into a unitary, nonracial system and justified order for submission of plan of desegregation.

8. Schools and School Districts ⇐13, 15(

Where freedom-of-choice plan was inadequate to convert school system into a unitary, nonracial system, district court correctly directed school board to submit plan of desegregation specifically providing for pupil assignment on basis

of unitary system of nonracial geographic attendance zones or a plan for consolidation or pairing of schools or grades or both.

4. Schools and School Districts ⇐13, 65(1), 133.1

District court properly ordered end to racial discrimination in employment of teachers and school personnel and in school activities and properly required new school construction be affected with objective of eradicating vestiges of dual school system.

5. Schools and School Districts ⇐154

School board's plan of desegregation which proposed to close three Negro high schools and assign their students to predominately white high schools and to institute a study as to best plan for completing a unitary system in both elementary and high schools was inadequate.

6. Schools and School Districts ⇐13

Because of lack of specificity in school board's proposed plan of desegregation, district court did not abuse its discretion in rejecting it and requiring strict compliance with its order to complete a unitary school system with beginning of next school year.

7. Schools and School Districts ⇐13

The district courts should retain jurisdiction of school segregation cases to insure that a constitutionally acceptable plan is adopted, and that it is operated in a constitutionally permissible fashion so that goal of desegregated, nonracially operated school system is rapidly and finally achieved.

8. Federal Civil Procedure ⇐2747

School board's appeal from order requiring more specificity in its plan for desegregation of county schools was not so unmeritorious as to permit award of double costs and counsel fees. Fed.Rules App.Proc. rule 38, 28 U.S.C.A.

Robert E. Morgan, Lillington, N. C., for appellants.

J. LeVonne Chambers, Charlotte, N. C. (Conrad O. Pearson, Durham, N. C., Jack Greenberg, James M. Nabrit, III, Robert Belton, New York City, and Chambers, Stein, Ferguson & Lanning, Charlotte, N. C., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges, sitting en banc.

CRAVEN, Circuit Judge:

This is an appeal from an order of the district court requiring of the defendant Board of Education more specificity in its plan for desegregation of the Harnett County Schools. This is the second appeal of the School Board, and again we affirm the order of the district court.

The first appeal was from an order entered August 21, 1964. The district court found at that time that there were 13,000 students in the Harnett County Schools, approximately 6,000 of whom were Negroes. Of the 20 public schools then operated by the county, six were attended solely by Negroes, and no Negro pupil had been assigned or transferred to a school attended solely or largely by pupils of another race. The district court concluded that the defendants were operating a racially segregated and discriminatory public school system and ordered that defendants transfer and admit plaintiff, Deborah Felder, to the elementary school to which she had requested transfer. It was further ordered that the other plaintiffs be allowed to file application for transfer to schools serving their grade level attended solely or largely by pupils of another race. The defendants were enjoined from refusing plaintiffs' admission to the schools of their choice because of their race. Finally, the district court ordered, retaining jurisdiction for further proceedings, that if the defendant Board did not adopt a nondiscriminatory plan of pupil assignment, it was to inform pupils and parents of the right of free choice at the time of initial assignment and at such reasonable times thereafter to be determined by the Board with approval of the court. In a per curiam opinion, we affirmed

the order of the district court, 349 F.2d 366 (1965).

The present dispute arose when, on May 13, 1967, plaintiffs moved the district court for further relief *i. e.*, seeking to have the School Board submit a plan for complete desegregation of the school system. The motion was heard July 23, 1968, and the district court entered its order that day in open court. The findings, conclusions and order were signed *nunc pro tunc* August 7, 1968. It was found that pursuant to the court's order of August 1964 one or more Negro students had been assigned to formerly all-white schools for the 1964–1965 school year. For the 1965–66 term the Board had adopted a freedom-of-choice plan affecting four grades, and 61 Negro students were assigned to formerly all-white schools. For the 1966–67 and 1967–68 terms, the freedom-of-choice plan was made applicable to all grades, pursuant to which 175 Negroes for the 1966–67 term and 166 Negroes for the 1967–68 term were assigned to previously all-white schools.

The district court found further that prior to the 1966–67 term no teachers or school personnel had been assigned across racial lines. For 1966–67, defendant assigned four white teachers to previously all-Negro schools and 12 Negro teachers to previously all-white schools. In 1967–68, 27 Negro teachers and 12 white teachers were assigned across racial lines. Although for 1968–69, 179 Negro students had requested and received assignment to previously all-white schools, the district court found that the Board of Education had not submitted any projected figures for teacher and pupil assignment for that year and had not presented a sufficient plan for desegregation of the Harnett County school system.

The court concluded that the Harnett County school system was an unconstitutional racially dual system and that the freedom-of-choice plan followed by the Board was inadequate to effectuate a racially nondiscriminatory school system. The remedial order required the Board to file by August 5, 1968, a plan of desegregation to eliminate the dual school system and to effectuate a transition to a unitary nonracial system by the opening of the 1969–70 school term. It was required that the plan provide "for the assignment of all students upon the basis of a unitary system of nonracial geographic attendance zones, or a plan for the consolidation or pairing of schools or grades or both." The court further required that there be no racial discrimination in the employment of teachers and school personnel and in school programs, activities and facilities. Finally, the court ordered that location of new schools and expansion of existing facilities consistent with proper operation of the system as a whole be effected with the objective of eradicating the vestiges of the dual school system.

On August 5, 1968, the School Board submitted its plan of desegregation to the district court. The plan called for closing the three all-Negro high schools with the beginning of the 1968–69 school year and assigning the pupils to predominately white schools. No plan for eliminating segregation in the elementary schools was submitted. Instead, the School Board proposed to "institute a detailed study as to the best plan for completing a unitary system in both high schools and elementary schools in the county by the beginning of the school year 1969–70." Noting that the time for "study" had passed, the district court again, on August 8, 1968, ordered defendant to file with the court before August 19, 1968, "a new and comprehensive plan of desegregation to be accomplished by the opening of the school year 1969–70 in compliance with the order of [the] court entered on July 23, 1968."

The School Board did, on August 19, 1968, submit a second plan to the court. It again proposed closing the three all-Negro high schools in the system with the beginning of the 1968–69 school year and assigning these students to pre-

dominately white schools.[1] All elementary school children were under the plan to be assigned "to the school nearest their home without regard to race, subject to space limitation, in which event the children will be assigned to the second nearest school nearest their home, without regard to race * * *." The plan provided for transportation of all students without racial discrimination.

On August 28, 1968, the district court found the proposed plan inadequate "in that the provisions relating to the high school students provide only for the involuntary assignment of Negro students to predominately white schools, and the provisions relating to elementary schools fail to utilize geographic attendance zones, consolidation, pairing of schools or grades or both" as directed by the July 23 and August 8 orders.

The district court ordered that the plan proposed August 19, 1968, be implemented for the 1968–69 school year and that the defendants file with the court before December 1, 1968, a comprehensive plan to completely desegregate all the elementary and secondary schools in the county school system in strict compliance with the July 23 and August 8 orders.

It is from the August 28, 1968, order of the district court that the School Board appeals. The Board's contentions worthy of enumeration come to these: (1) The district court incorrectly decided that the freedom-of-choice plan followed in Harnett County was inadequate to effectuate a transition to a racially nondiscriminatory school system. (2) It was improper for the district court to require that any plan submitted should provide for assignment of all students upon the basis of a unitary system of nonracial geographic attendance zones or, as an alternative, a plan for the consolidation or pairing of grades or schools or both. (3) And even if the district court's order was correct, it erred in refusing to approve the plans of August 5 and August 19, 1968, submitted by the School Board.

[1] On May 27, 1968, the Supreme Court decided the companion cases Green v. School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716; Raney v. Board of Education, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727; and Monroe v. Board of Commissioners, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733, which taught that freedom-of-choice is but a means to the end of achieving a nonracial system of public education and that the School Board has the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch," [2] a system in which there are no white schools and no Negro schools but just schools.

[2] In *Green*, 13 years after Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (Brown II), commanded abolition of dual school systems, the Supreme Court found that New Kent County's freedom-of-choice plan was inadequate to accomplish that end in that in the three years of its operation no white pupil had chosen to attend the county's Negro school and 85 percent of the Negro children in the system still attended the county's all-Negro school. The district court found similar circumstances to exist in Harnett County in its July 23, 1968, order. After three years of freedom-of-choice in Harnett County (the schools were completely segregated up to and throughout the 1963–64 school year), it was found that only 4.3 percent of the Negro students were attending previously all-white schools. The appendixes to the briefs filed with us indicate that there are as yet no white students in the predominately Negro schools.[3]

1. Apparently this has been accomplished resulting in 33.8 percent of Negro students attending so-called "white" schools.

2. Green v. School Board of New Kent County, 391 U.S. at 437, 88 S.Ct. at 1694, 20 L.Ed.2d at 723.

3. Some American Indians attend these schools.

These facts, we think, justified the district court's conclusion that the freedom-of-choice plan in Harnett County was inadequate to convert the school system into a unitary, nonracial system and justified its order for submission of a plan of desegregation. Green v. School Board of New Kent County, *supra*.

[3, 4] Moreover, the district court correctly required in its July 23, 1968, order that the plan submitted should specifically provide for pupil assignment on the basis of a unitary system of nonracial geographic attendance zones or a plan for consolidation or pairing of schools or grades or both. *Cf.* Nesbit v. Statesville City Board of Education, 345 F.2d 333, 335 (4th Cir. 1965). "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discriminations in the future." Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709, 715 (1965); *see* Green v. School Board of New Kent County, *supra*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d at 723, n. 4; Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964). The court likewise properly ordered an end to racial discrimination in the employment of teachers and school personnel and in school activities and properly required new school construction be effected with the objective of eradicating the vestiges of the dual school system.

[5] In that we find the July 23, 1968, order of the district court to have been properly entered, we are compelled to find that the School Board's August 5, 1968, plan submitted pursuant to it was inadequate. That plan proposed to close the three Negro high schools and assign their students to predominately white high schools and to institute a study as to the best plan for completing a unitary system in both the elementary and high schools. It was patently not in compliance with the court's order. The only concrete proposal was in regard to the Negro high schools. There was no explanation offered as to how the School Board determined upon particular schools for extinction, nor did the closing plan disclose criteria for assignment of the students of the closed schools except for a cryptic reference to bus routes. Whether the School Board acted fairly or invidiously with reference to the Negro high school pupils is not disclosed either in theory or in the mechanics of a plan. There was no proposed pupil assignment of elementary students and no mention of ending racial discrimination in employment practices and in school activities. No resolution was made as to new school construction. For these deficiencies, the district court properly rejected the School Board's submission.

The Board's proposed plan of August 19, 1968, is not so plainly defective and appears to be a more serious effort to comply with the court's order to complete a unitary school system with the beginning of the 1969–70 school year. Again without disclosing criteria it proposes to close the Negro high schools and to assign the pupils to predominately white schools, but for the first time a proposal is made to the end of eliminating the dual system at the elementary grade level. Beginning with the school year 1969–70 Harnett County proposes to assign elementary school children to the school nearest their homes without regard to race. But if space limitation requires, elementary school children may be assigned to the school next nearest their homes. The plan has defects but the defects are not such that they may not be easily cured by more specificity on the part of the School Board.

For example, the School Board's assignment of elementary students to the school nearest or second nearest their homes will necessarily result in something akin to geographical attendance zones for the various elementary schools. But because the plan does not show exactly how the Board proposes to make these assignments it does not eliminate the possibility that the zones will be gerrymandered to perpetuate the dual

school system. Furthermore, the plan does not specify how students will be assigned from the elementary schools to the high schools and thus does not eliminate the possibility that whatever feeder system is adopted to effect this transition will not recreate a dual system at the high school level. Finally, the plan does not demonstrate nonracial criteria in the assignment of Negro high school students.

[6] These deficiencies are simply illustrative. Others may occur to the district judge and to a school board intent upon dismantling a segregated system. We note also that the Board's last proposal makes no mention of eliminating racial discrimination in employment practices or in school activities, nor does it address itself to expansion of school facilities with a view toward eradicating the vestiges of the dual school system. Because of the lack of specificity in the School Board's August 19, 1968, proposal, the district court did not abuse its discretion in rejecting it and requiring strict compliance with its order of July 23, 1968.

[7] We find no merit in the School Board's contention that the district court erred in refusing to sustain its motion to dismiss. "[The] District Courts 'should retain jurisdiction in school segregation cases to insure (1) that a constitutionally acceptable plan is adopted, and (2) that it is operated in a constitutionally permissible fashion so that the goal of a desegregated, non-racially operated school system is rapidly and finally achieved.' Kelley v. Altheimer [8 Cir.] 378 F.2d 483, 489. *See also* Kemp v. Beasley [8 Cir.] 389 F.2d 178." Raney v. Board of Education, *supra*.

[8] We are asked by appellees to hold that the School Board's appeal is frivolous under Rule 38, Federal Rules of Appellate Procedure, and in our discretion to award damages, specifically double costs and counsel fees. Although we have seen more meritorious appeals, we do not think this one may be characterized fairly as groundless or vexatious. There is not present here the pattern of evasion and obstruction labeled "extreme" in Bell v. School Board of Powhatan County, Virginia, 321 F.2d 494 (4th Cir. 1963). Nor are the issues here mooted by compliance as were those in Coppedge v. Franklin County Board of Education, 394 F.2d 410 (4th Cir. 1968). On balance we decline to allow double costs and counsel fees. Bradley v. School Board of City of Richmond, Virginia, 345 F.2d 310 (4th Cir. 1965). Appellees will, of course, be entitled to the taxation of costs under Rule 39, Federal Rules of Appellate Procedure.

Affirmed.

SOBELOFF, Circuit Judge, (with whom WINTER, Circuit Judge, joins) concurring in part, dissenting in part:

The majority opinion has well stated the grounds for dissatisfaction with the School Board's unparticularized proposals. I concur in the affirmance of the District Court's order under the circumstances of this case. Of course, on another record, presenting different facts, geographical attendance zones might not be an effective way to accomplish the required result. See, e. g., Brewer v. School Board of City of Norfolk, Va., 397 F.2d 37, 41–42 (4 Cir. 1968).

However, I think it not too harsh to call this a frivolous appeal, and I would therefore award the plaintiffs reasonable counsel fees.[1] As the majority recognizes, citing cases, there is precedent in this circuit and elsewhere for the award of counsel fees in school cases, and the reluctance to award fees in this instance is not justified. Such an award is essential to do full justice. The allowance of reasonable counsel fees, including disbursements, would not only transfer the burdensome cost of the litigation from

1. Rule 38 of the Federal Rules of Appellate Procedure provides:
   If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

those who have been and continue to be deprived of their constitutional rights to those responsible for the deprivation, but it would also provide a suitable and necessary incentive to the school authorities to get on with the task of desegregating.

At the hearing in the District Court the parties had before them the Supreme Court's decision in Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716, which held a freedom of choice plan constitutionally invalid. In the course of that opinion, the Court discussed the duty of the local boards in terms which demonstrate the frivolity of the present appeal. The Court stated that local boards are

> clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch * * *. The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

The Court went further and placed on the local board the burden of proving its plan constitutionally valid. The Court explicitly added:

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation.

The facts as to the elementary pupils' residences have at all times been available to the Board, but it has not even been intimated that the Board ever analyzed the data to determine whether the plan it proposed would eliminate segregation. That inquiry the Board leaves for another day or year. Indeed, it was confessed at the hearing of the appeal that in the months intervening since the District Court's order the Board had taken no steps to make this determination. Twice since the trial in the District Court last July the Board has submitted palpably deficient plans, in the teeth of the *Green* decision. The course followed by the Board, including the taking of this appeal, is hardly consistent with its profession of a desire fully to comply with the requirements of the law.

The overall history of the case, as related in the majority opinion, and the fact that 13 years have now passed since *Brown II*, strongly suggest that the Board has acted to perform its constitutional duty only when goaded by the courts or the Department of Health, Education and Welfare. Under the circumstances, it appears that the effect, if not the intended role, of this appeal which was doomed from its inception, was merely to retard compliance.

The frivolity of the appeal is further signalled by the appellant's startling statement at page 8 of its brief that it is proceeding "upon the theory that the Harnett County Board of Education does not have to work toward the objective of the correction of racial imbalance in its various public schools." This flouts the plain requirements of the law, and it comes too late in the day to be given serious consideration by any court.

I would award reasonable attorney fees to discourage further dilatory tactics.

ALBERT V. BRYAN, Circuit Judge (dissenting):

I think the District Court, and now this court, go far too far in their exactions of the School Board. It has sincerely endeavored since the 1966–67 and 1967–68 school terms to comply with each order of the District Court.

As the majority opinion notes, by August 19, 1968 all of the Negro high school students had been placed in "white" schools, and without complaint of discrimination. Moreover

> "All elementary school children were under the plan to be assigned 'to the school nearest their home without regard to race, subject to space limitation, in which event the children will be assigned to the second nearest school nearest their home, without

regard to race * * *.' The plan provided for transportation of all students without racial discrimination."

To me this seems a fair and just arrangement and should end the litigation. But the decree now appealed by the Board demands even more of the school authorities. The administration should have been allowed room in effectuating the plan of August 19, 1968 and been let alone until corrective measures were necessitated. Not until then should the court have interfered. Overreadiness to oversee is disruptive of school operation; too, it encourages captious faultfinding, as here.

The present rulings, at trial and on appeal, are meddlesome and oppressive. I would reverse.

ANALYSIS BY SENATOR ERVIN GREEN *v.* COUNTY SCHOOL BOARD OF NEW KENT COUNTY

Mr. ERVIN. I insert in the record of these hearings at this point an analysis of the opinion in the *Green Case* made by me and an analysis of the same case made by an editorial writer of the Washington Star.

Judicial activists cite the opinion of Justice Brennan in *Green* v. *County School Board of New Kent County*, 391 U.S. 430, as a pronouncement of the Supreme Court that the Brown Case requires all public schools to be compulsorily integrated if both black and white children of school age are obtainable and that all "freedom of choice" plans are automatically unconstitutional.

I shall not undertake to say what the *Green Case* holds. If one desires to speak with assurance concerning it, he must limit his remarks to these observations; Its facts are plain; its verbiage is ambiguous and murky; it lays down no understandable or workable rule.

New Kent County is a rural county in Eastern Virginia which possesses only two schools. One of these schools, the New Kent School, is designated by the opinion as a "white" school, and the other, the Watkins School, is designated by the opinion as a "Negro" school. Three years before the opinion was written, the School Board of New Kent County completely removed from its school system all state-imposed segregation, and adopted a "freedom of choice" plan which allowed each black and white school child in New Kent County to attend whichever school he chose to attend.

The District Court and the Fourth Circuit Court of Appeals adjudged this freedom of choice plan valid, and the Supreme Court reversed their rulings and remanded the case to the District Court with a statement that the school board must be required to "fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'negro' school, but just schools." I will not undertake to determine whether the case constitutes a solemn adjudication that the words "just schools" imply that all schools must be black and white schools where black and white children are available for coercive mixing.

I will make certain comments, however, concerning the only real reason given by the opinion for the rejection of the school board's "freedom of choice" plan.

The opinion declares that such plan did not constitute an "adequate compliance" with the responsibility imposed upon the school board by the second decision in the Brown Case (347 U.S. 294. 300–301), "to achieve a system of determining admission to the public schools on a non-racial basis" because not a single one of the 550 white children in the county had chosen to attend Watkins School, and only 115 of the 740 black children in the county had chosen to attend the New Kent School.

This ruling to the contrary notwithstanding, it is as clear as the noonday sun in a cloudless sky that the most effective way "to achieve a system of determining admission to the public schools on a non-racial basis" is to open the public schools to children of all races, and allow them or their parents to choose the schools they attend. Oceans of judicial sophistry cannot wash out this plain truth.

If the *Green Case* means anything, it means that freedom of choice plans are valid if black and white children choose to mix themselves in public schools in proportions pleasing to Supreme Court Justices, but are invalid if black and white children exercise their freedom of choice in a manner displeasing to Supreme Court Justices.

Obviously, the United States cannot continue to boast that it is a free country if the freedom of its people hangs on such an arbitrary and tenuous judicial thread.

I wish to call to the attention of the Senate a cartoon and editorial which appeared in the Washington Star on June 23, 1968, and which are highly pertinent to the subject under consideration. The cartoon depicts a black-robed Federal Judge who presides over a classroom inhabited by small children, banging his gravel on the teacher's desk and declaring in stern judicial language: "This court will come to order."

I deeply regret that the format of the Record of the hearings does not permit reproduction of the cartoon for the edification of Senators. Fortunately, however, I can have the editorial reproduced in the hearing record.

Therefore, I ask that the editorial which is entitled "Our Judges Should Stick To Their Judging," be inserted at this point in the hearing Record as a part of my remarks.

"Eleven months ago the American Association of School Administrators, with some 17,000 members around the country, strongly urged that an appeal be taken from Judge Skelly Wright's decision in the District school case.

The association said that the decision "usurps the prerogatives of boards of education and school administrators" and, further, that Judge Wright's educational theories are "wrong and dangerous."

Now, a year after the ruling, an appeal will be heard this week by the United States Court of Appeals. What the result will he is, of course, uncertain. But one may at least hope that the appellate judges will return control of the Washington schools to the school authorities, and that Judge Wright will be encouraged to devote himself to his judicial knitting.

Judge Wright has not been the only federal judge to get into the business of running or trying to run public school systems. The Supreme Court and the Fourth Circuit Court of Appeals also got in a few whacks this year.

The case of Brown vs. Board of Education was decided by the Supreme Court in 1954 and an implementing decision, known as Brown II, came down a year later.

The 1954 Brown ruling held that segregated public school systems imposed or required by state or local law were in violation of the Fourteenth Amendment and therefore unconstitutional. Brown II decreed that such segregated systems must be abolished. The court did not say, however, that compulsory segregation must be replaced by compulsory integration.

John J. Parker, then chief judge of the Fourth Circuit construed the Brown decision in this language: "It (the court) has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. * * * Nothing in the Constitution or in the decision of the Supreme Court takes away from the people the freedom to choose the schools they atteud."

Chief Judge Parker was a distinguished jurist, not a man to bypass or undermine Supreme Court rulings. A few years before his death in 1958 he was awarded the American Bar Association's gold medal for "conspicuous service to American jurisprudence." But in undertaking to construe Brown, Judge Parker spoke too soon. He conldn't foresee, of course, what the Supreme Court would say in May 1968 in the case of Virginia's New Kent County, and he would have been horrified to read that opinion.

New Kent is a small rural county with only two schools for its 740 Negro and 550 white pupils—New Kent School on the east side of the county for whites and George W. Watkins School on the west for Negroes. There is no residential segregation in the county.

New Kent, as it had to do, went along for several years after Brown with the Virginia Legislature's various efforts to avoid school desegregation. But three years ago tbe county adopted a freedom of choice plan. There has been no claim that the plan did not offer a truly free choice or that it was applied in any discriminatory way. No white children transferred to the Watkins School. But in 1967 a total of 115 Negro children applied for and were enrolled in New Kent. This was up from 35 in 1965 and 111 in 1966. To sum it up, no white children have gone to the "colored" school, hut slightly more thau 15 percent of the Negro children were attending the "white" school at the end of this year's term.

In an ambiguous opinion, Justice Brennan said this was not good enough.

He did not, and indeed he could not, properly say that was bona fide freedom of choice plan, such as New Kent's, is unconstitutional. In fact, he did not cite any specific constitutional hasis for holding that the New Kent system wouldn't do.

He said the plan placed a "burden" on children and their parents—the burden of applying for admission to one school or the other if they wanted to switch. He did not stress the point that the parents of 115 Negro children did not find this too burdensome last year. He also suggested that the county should adopt some kind of "zoning" system, although he was very vague about this. And without more ado, he set aside a ruling by the Fourth Circuit which had upheld the New Kent plan.

So much for that. But what is it that New Kent County is supposed to do that will satisfy the learned justices of the Supreme Court when they doff their

judicial robes and sit as a local school board? Justice Brennan didn't say. The county authorities are left in the dark. But we have several suggestions. (1) The ruling applies only to states whose schools formerly were segregated by law, which means the southern and border states. If this is what the law now requires in those states, why is it not required in all states? (2) This decision, although it doesn't spell it out, clearly commands compulsory integration, and this without specifying any constitutional basis for the command. Judge Brennan did cite some language from Brown II, but Brown II is not the Constitution. (3) The court is saying, though not in so many words, that some white children in New Kent County, regardless of their wishes, must be compelled hy the local authorities to attend the "colored" school, and that more than 115 Negro children, regardless of their desires, must be compelled to attend the "white" school. Precisely what racial "mix" will be satisfactory? Again, the jusctices in their infinite wisdom did not say. We suspect they haven't the foggiest notion. We also suspect that what they have done will play hob with New Kent County's public school system and the education of both its black and white children.

Another judicial shocker, which reinforces our belief that judges, especially eager-beaver judges, should stay out of the schoolroom, has just come down from the Fourth Circuit.

The effect of this 5-to-2 ruling in a Norfolk case is to cut down the neighborhood school concept. Again, the court majority uses weasel words. It says that the assignment of pupils to neighborhood schools is a sound concept. But it adds that this is not true if purely *private* discrimination in housing keeps Negroes out of a given residential area. How does private discrimination, as distinguished from public or state discrimination, offend the Constitution? The majority judges, of course, do not say. But we note with interest the dissenting opinion by Judge Albert V. Bryan, who said the court was guilty of "usurpation," and that the majority through the decision "once again acts as a school board and as a trial court, and now is about to act as a city planning commission." This last presumably refers to the problem of how to bus pupils in Norfolk, which has no school bus system.

To sum it up, federal judges have a constitutional duty and the competence to strike down any law which imposes school segregation. They have neither the duty nor the competence to demand compulsory integration and to run the schools by judicial fiat. The sooner the judges recognize this, if they ever recognize it, the better it will be for our system of public education.

Anaylsis by Senator Ebvin

National Labor Relations Board *v.* United Rubber Workers

269 F. 2nd 694 (decided June 26, 1959)

Between 1942 and 1946 the Union represented workers at the O'Sullivan Rubber Company. Between 1946 and March, 1956 apparently it no longer represented the employees. In March, 1956 the Union picketed the Board for an election which it won 343 to 2 and it was thus certified. Despite the strike no collective bargaining agreement was signed for over two years. Except for 80 employees who returned to work, the rest of the work force stayed out on strike and 265 new employees were hired. Upon petition hy the employer and one employee a decertification election was held and the Union lost in October 1957 by 288 to 5. The Union continued to strike and to urge a boycott of the Company after it lost the election. The Board found that the Union had committed an unfair labor practice in sec. 8(b)1A by picketing and boycotting to force recognition in spite of having been rejected by an election. The Board followed it Curtis Brothers decision of 1957 which held that the economic harm done to the employer also injured his employees and was "restraint and coercion" within the terms of the Act.

The Court of Appeals in an opinion by Judge Soper, Judge Haynsworth concurring and Judge Soboloff dissenting, agreed with the Board that peacefully picketing to force recognition after the Union loses an election, is a violation of the statute. It disagreed with the Court of Appeals of the District of Colnmbia in *Drivers Local* v. *NLRB* which held the opposite. Tbe court recognized that there was ambiguity in the statute and in the legislative history, but felt that the Board's reading of the law was, on balance, correct.

Judge Soboloff in his dissent stated that the Board, between 1949 and 1957 had not considered peaceful recognitional picketing as a restraint and coercion.

He also recognized that the legislative history was indecisive hnt considered that the debate in the Senate, then heing conducted on the Kennedy-Ervin hill illustrated that Congress was of the view that the 1947 Act did not make this kind of picketing unlawful. He felt that the Board should not impose a new interpretation of statutory language in such an ambiguous area of the law where important rights of free speech were involved.

The Supreme Court reversed per curiam based on its opinion in the *National Labor Relations Board* v. *Drivers Union* decided the same day. In that case in an opinion by Justice Brennan, the Court held that the Taft-Hartley Act specifically sought to protect the right to strike, thns the Board could not impose limitations upon this right where statntory anthority was ambiguous. Section 8(b)4 contains specific limitations on the right to strike, thus the Board cannot use less precise authority under sec. 8(b)1A to impose more restrictions on the right to strike unless the legislative history of this section clearly supports its view. Brennan reasoned that a review of the legislative history of the Taft-Hartley Act does not support the view that Congress meant to limit peaceful, recognitional picketing by the words "restraint and coercion". The Board agreed with this view between 1949 and 1957 when it decided the *Curtis Brothers* case.

Brennan said that the fact that after the Court of Appeals decided this case, but before it was argued before the Supreme Court, Congress enacted a new section 8(b)7 does not mean that the Court shonld remand the case to the Board for further considerations. Brennan cited a case decided after the passage of this legislation as proof that it had the power under Sec. 8(b)1A. Tbe 1959 legislation consists of an elaborate code to govern organizational picketing and If the Board is correct, then it could disregard tbis code Brennan wrote.

Justices Stewart, Frankfnrther and Whittaker submitted a memorandum in which they agreed with the Board that the case should be remanded for further consideration in light of the 1959 legislation. In sec. 8(b)7 Congress prohibited recognitional picketing (a) if another Union were certified, (b) if a valid election had been held within the preceding twelve months, and (c) if the Union failed to file a petition within thirty days of the picketing. The three Justices felt that this statute covered the facts in the *Curtis* case and, for this reason, considered that it should be sent back to the Board.

The facts in the *Rubber Workers* case also would he covered by the new section 8(b)7.

Analysis by Senator Ervin

United Steelworkers of America *v.* Enterprise Wheel and Car Corp.

In the Court of Appeals: 269 F 2d 327 (August 24, 1959)

The union and the company had a collective hargaining agreement which provided that any differences "as to the meaning and application of the agreement should be submitted to arbitration." The contract also provided that employees who were discharged in violation of the agreement should be reinstated with back pay. On January 18, 1957, eleven union members walked off the job, against union advice, to protest the discharge of another employee. The company viewed their action as resignations and discharged them. The union sought to invoke grievance procedures under the contract but the company refused to admit the dispute to arbitration. The union then filed an unfair labor practice charge with the National Labor Relations Board but the Board refused to take action. The union then sued in the District Court to force the company to arbitrate and was successful. The issue was submitted to the arbitrator after the collective bargaining agreement had expired. The arbitrator found that the employees had no right to quit but that the discipliue warranted by the case should have been only ten days' suspension. He ordered the company to offer reinstatement to those who would return and to offer back pay to the employees for the time they were off the job minus the ten days' suspension. Since the arbitration award was made after the collective bargaining agreement expired, the award covered a period during the existence of the contract and for sometime thereafter.

The union sued in District Court under 301 of the Labor Management Relations Act of 1959 and the District Court directed the company to comply with the award.

In an opinion written by Judge Soper and concurred in by Judges Haynsworth and Sobeloff, the court held that there was jurisdiction to enforce the award despite the company's claim that the union had no right to sue to protect individual employee rights.

The company further claimed that the arbitrator had no power to issue an award which covered events subsequent to the expiration of the contract. It contended that the power to issue the award ended when the collective bargaining agreement expired. The court agreed that that portion of the award covering the period after the expiration of the contract was invalid but the portion which covered the period while the contract was in force was enforceable. In doing so, it said it was conscious of the policy of encouraging settlement of disputes through arbitration but further held that the award was not entirely unenforceable despite the fact that the arbitrator had not calculated the entire amount owed to the employees. It ordered the issue returned to the arbitrator to determine these amounts.

In the Supreme Court: 363 U.S. 593 (June 20, 1960)

In an opinion decided by Justice Douglas, with Justice Whittaker dissenting, and Justice Black not participating, the Court ruled that the case was governed by the decision in the case of *United Steelworkers of America* vs. *American Manufacturing Co.* which was decided that same day. In the *American Manufacturing Co.* case, the Court announced the new rule that under Section 301 and geueral labor management relations policy, courts were not permitted to review the merits of an arbitrator's decision including his interpretation of the contract. Applying this rule to the *Enterprise* case, the Court acknowledge that the arbitrator's award was ambiguous. If he had decided that his power to render the award was based on general principles of case law and common law, it was clear that this was an erroneous action on his part. If he found his power through an interpretation of the contract, then the Court of Appeals had no power to disagree with this interpretation. Since the Court of Appeals decision appears to be based upon a different interpretation of the contract, that court erred. The Supreme Conrt ordered that the case be referred back to the arbitrator for calculation of the entire sums dne the employees.

Justice Whittaker dissented on the grounds that the arbitrator exceeded his powers and that the Court of Appeals was correct in finding that the collective bargaining agreement did not give him the power to do so. Further, it was his view that the power of the arbitrator and the rights belonging to the employees under the contract ceased when the contract expired.

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